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INTRODUCTORY INSTRUCTIONS

100. Preliminary Admonitions (*Revised 2004*)

You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a fair verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including your family and friends. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to me as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] You must decide this case based only on the evidence presented in this trial and the instructions of law that I will provide. Nothing presented outside this courtroom is evidence unless I specifically tell you it is.

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When it is time to begin your deliberations, you will meet in the jury room. You may discuss the case only in the jury room and only when all the jurors are present.

Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

You must decide what the facts are in this case. And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

Directions for Use

This instruction should be given at the outset of every case.

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that “it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.”

Sources and Authority

- Article I, section 16 of the California Constitution provides that “trial by jury is an inviolate right and shall be secured to all.”
- Code of Civil Procedure section 608 provides, in part: “In charging the jury the Court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact.” (See also Evid. Code, § 312; Code Civ. Proc., § 592.)
- Under Code of Civil Procedure section 611, jurors may not “form or express an opinion” prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443–444 [54 Cal.Rptr. 68].)
- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)

- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520–521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721].)
- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co., Inc.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)
- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Elec. Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)
- It is improper for jurors to receive information from the news media about the case. (*Province v. Ctr. for Women’s Health and Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr. 2d 667], disapproved on other grounds in *Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr. 2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robbins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)
- Jurors must avoid bias: “ ‘The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.’ [Citations.]” (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)
- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge’s comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257-259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929].) “It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge’s opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury’s determination.” (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344].)

INTRODUCTORY INSTRUCTIONS

111. Instruction to Alternate Jurors (*New 2004*)

As [an] alternate juror[s], you are bound by the same rules that govern the conduct of the jurors who are sitting on the panel. You will observe the same trial and should pay attention to all of my instructions just as if you were sitting on the panel. Sometimes a juror needs to be excused during a trial for illness or some other reason. If that happens, an alternate will be selected to take that juror's place.

Directions for Use

If an alternate juror is substituted, see Instruction 5007, *Substitution of Alternate Juror*.

Sources and Authority

- “Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors.” (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048, internal citations omitted.)

- Code of Civil Procedure section 234 provides:

Whenever, in the opinion of a judge of a superior court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as “alternate jurors.”

These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.

The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she has been selected as one of the original jurors.

All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.

EVIDENCE

201. More Likely True—Clear and Convincing Proof (*Revised 2004*)

~~In this case, there are some specific~~ **Certain** facts ~~that must be proved by the higher standard of~~ clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. I will tell you specifically which ~~of the~~ facts must be proved by clear and convincing evidence. ~~All the other facts will be proved if they are more likely to be true than not true.~~

Directions for Use

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

This instruction should be read immediately after Instruction 200, *Obligation to Prove—More Likely True Than Not True*, if the jury will have to decide an issue by means of the clear-and-convincing evidence standard.

Sources and Authority

- Evidence Code section 115 provides: “ ‘Burden of proof’ means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [¶] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”
- Evidence Code section 500 provides: “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”
- Each party is entitled to the benefit of all the evidence, including the evidence produced by an adversary. (*Williams v. Barnett* (1955) 135 Cal.App.2d 607, 612 [287 P.2d 789]; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 305, p. 352.)
- “Proof by clear and convincing evidence is required ‘where particularly important individual interests or rights are at stake,’ such as the termination of parental rights, involuntary commitment, and deportation. However, ‘imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.’ ” (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487

[286 Cal.Rptr. 40, 816 P.2d 892] (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389–390).)

- “ ‘Clear and convincing’ evidence requires a finding of high probability.” (*In re Angelia P.* (1981) 28 Cal.3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198].)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions §§ 38, 39

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 45.4, 45.21

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, Trial, §§ 551.90, 551.92 (Matthew Bender)

EVIDENCE

204. Willful Suppression of Evidence (*Revised 2004*)

You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.

Directions for Use

This instruction should be given only if there is evidence of suppression. (*In re Estate of Moore* (1919) 180 Cal. 570, 585 [182 P. 285]; *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1051 [213 Cal.Rptr. 69]; *County of Contra Costa v. Nulty* (1965) 237 Cal.App.2d 593, 598 [47 Cal.Rptr. 109].)

If there is evidence that that a party improperly altered evidence (as opposed to concealing or destroying it) users should consider modifying this instruction to account for that circumstance.

In *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12 [74 Cal.Rptr. 2d 248, 954 P.2d 511], a case concerning the tort of intentional spoliation of evidence, the Supreme Court observed that trial courts are free to adapt standard jury instructions on willful suppression to fit the circumstances of the case, “including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation.”

Sources and Authority

- Evidence Code section 413 provides: “In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party’s failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.”
- Former Code of Civil Procedure section 1963 (5) permitted the jury to infer “[t]hat the evidence willfully suppressed would be adverse if produced.” Including this inference in a jury instruction on willful suppression is proper because “Evidence Code section 413 was not intended as a change in the law.” (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 994 [16 Cal.Rptr.2d 787] disapproved of on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179].)
- “A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of the fact will infer, and properly so, that the evidence, had it been

produced, would have been adverse.” (*Breland v. Traylor Engineering and Manufacturing Co.* (1942) 52 Cal.App.2d 415, 426 [126 P.2d 455].)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 313, p. 358

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial § 115

CALIFORNIA FORMS PLEADING AND PRACTICE, Ch. 551, Trial, § 551.93
(Matthew Bender)

CONTRACTS

302. Contract Formation—Essential Factual Elements (*Revised 2004*)

[*Name of plaintiff*] claims that the parties entered into a contract. To prove that a contract was created, [*name of plaintiff*] must prove all of the following:

- ~~1. That the parties were legally capable of entering into the contract;~~
21. That the contract terms were clear enough that the parties could understand what each was required to do;
- ~~3. That the contract had a legal purpose;~~
42. That the parties agreed to give each other something of value. [A promise to do something or not to do something may have value]; and
53. That the parties agreed to the terms of the contract.

[When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. You may not consider the parties' hidden intentions.]

If [*name of plaintiff*] did not prove all of the above, then a contract was not created.

Directions for Use

This instruction should only be given where the existence of a contract is contested. If both parties agree that they had a contract, then the instructions relating to whether or not a contract was actually formed would not need to be given. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Users should omit elements in this instruction that are not contested so that the jury can focus on the contested issues. Read the bracketed paragraph only if element #53 is read.

The ~~terms~~ elements regarding “~~legally capable~~” legal capacity and “legal purpose” ~~may require further definition if~~ are omitted from this instruction because these issues are not likely to be before the jury. ~~However, the judge would most likely decide these two issues and so these issues could be deleted from the instruction before it is given to the jury. If legal capacity or legal purpose is factually disputed then this instruction should be amended to add that issue as an element. Regarding legal capacity, the element could be stated as follows: “That the parties were legally capable of entering into a contract.” Regarding legal purpose, the element could be stated as follows: “That the contract had a legal purpose.”~~

The final element of this instruction would be given prior to instructions on offer and acceptance. If neither offer nor acceptance is contested, then this element of the instruction will not need to be given to the jury.

Sources and Authority

- Civil Code section 1550 provides:
It is essential to the existence of a contract that there should be:
 1. Parties capable of contracting;
 2. Their consent;
 3. A lawful object; and
 4. A sufficient cause or consideration.

Capacity

- Civil Code section 1556 provides: “All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.”

Lawful Object

- The issue of whether a contract is illegal or contrary to public policy is a question of law. (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 350 [258 Cal.Rptr. 454].)

Certainty

- “In order for acceptance of a proposal to result in the formation of a contract, the proposal ‘must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.’ [Citation.]” (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 [71 Cal.Rptr.2d 265].)
- Section 33(1) of the Restatement Second of Contracts provides: “Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.” Section 33(2) provides: “The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.”
- Courts have stated that the issue of whether a contract is sufficiently definite is a question of law for the court. (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770, fn. 2; *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623 [2 Cal.Rptr.2d 288].)

Consideration

- Civil Code section 1605 defines “good consideration” as follows: “Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor is a good consideration for a promise.”
- Civil Code section 1614 provides: “A written instrument is presumptive evidence of consideration.” Civil Code section 1615 provides: “The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.”
- In *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884 [268 Cal.Rptr. 505], the court concluded that the presumption of consideration in section 1614 goes to the burden of producing evidence, not the burden of proof.
- Lack of consideration is an affirmative defense and must be alleged in answer to the complaint. (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808 [194 Cal.Rptr. 617]).
- “Consideration consists not only of benefit received by the promisor, but of detriment to the promisee. . . . ‘It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.’ ” (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 [6 Cal.Rptr.2d 99], internal citation omitted.)
- “Consideration may be an act, forbearance, change in legal relations, or a promise.” (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 207.)

Mutual Consent

- Mutual consent is an essential contract element. (Civ. Code, § 1550.) Under Civil Code section 1565, “[t]he consent of the parties to a contract must be: 1. Free; 2. Mutual; and 3. Communicated by each to the other.” Civil Code section 1580 provides, in part: “Consent is not mutual, unless the parties all agree upon the same thing in the same sense.”
- California courts use the objective standard to determine mutual consent: “[A plaintiff’s] uncommunicated subjective intent is not relevant. The existence of mutual assent is determined by objective criteria. The test is whether a reasonable person would, from the conduct of the parties, conclude that there was mutual agreement.” (*Hilleary v. Garvin* (1987) 193 Cal.App.3d 322, 327 [238 Cal.Rptr. 247], internal citations omitted; see also *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557 [79 Cal.Rptr.2d 226].)

- Actions as well as words are relevant: “The manifestation of assent to a contractual provision may be ‘wholly or partly by written or spoken words or by other acts or by failure to act.’ ” (*Merced County Sheriff’s Employees Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 [233 Cal.Rptr. 519] (quoting Rest. 2d Contracts, § 19).)
- The surrounding circumstances can also be relevant in determining whether a binding contract has been formed. (*California Food Service Corp., Inc. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 [182 Cal.Rptr. 67].) “If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract.” (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47 [303 P.2d 565].)

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 119–260, 332, 357, 364, 429, 430

13 California Forms of Pleading and Practice, Ch. 140, Contracts, §§ 140.10, 140.20–140.25 (Matthew Bender)

5 California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

27 California Legal Forms, Ch. 75, Formation of Contracts and Standard Contractual Provisions, §§ 75.10, 75.11 (Matthew Bender)

CONTRACTS

337. Affirmative Defense—Novation (*Revised 2004*)

[Name of defendant] claims that the original contract with [name of plaintiff] cannot be enforced because the parties substituted a new and different contract for the original.

To succeed, [name of defendant] must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

If you decide that [name of defendant] has proved this, then the original contract is not enforceable.

Directions for Use

If the contract in question is not the original contract, specify which contract it is instead of “original.”

Although there is language in *Alexander v. Angel* (1951) 37 Cal.2d 856, 860–861 that could be read to suggest that a novation must be proved by the higher standard of clear and convincing proof, an examination of the history of that language and the cases upon which the language in *Alexander* depends (*Columbia Casualty Co. v. Lewis* (1936) 14 Cal.App.2d 64, 72 and *Houghton v. Lawton* (1923) 63 Cal.App. 218, 223) demonstrates that the original use of the term “clear and convincing,” carried forward thereafter without analysis, was intended only to convey the concept that a novation must clearly be shown and may not be presumed. The history of the language does not support a requirement that a party alleging a novation must prove there is a high probability (i.e., clear and convincing proof) that the parties agreed to a novation. See also sections 279 and 280 of the Restatement Second of Contracts. A party alleging a novation must prove that the facts supporting the novation are more likely to be true than not true.

Sources and Authority

- Civil Code section 1530 provides: “Novation is the substitution of a new obligation for an existing one.”
- Civil Code section 1531 provides:

Novation is made:

1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;
2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,

3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

- “A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. A novation is subject to the general rules governing contracts and requires an intent to discharge the old contract, a mutual assent, and a consideration.” (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463 [98 Cal.Rptr. 482].)
- Conduct may form the basis for a novation although there is no express writing or agreement. (*Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773 [97 P.2d 798].)
- Novation is a question of fact, and the burden of proving it is upon the party asserting it. (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860.)
- “When there is conflicting evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact.” (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980 [269 Cal.Rptr. 807].)
- “The ‘question whether a novation has taken place is always one of intention,’ with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement.” (*Alexander, supra*, 37 Cal.2d at p. 860, internal citations omitted.)
- “[I]n order for there to be a valid novation, it is necessary that the parties intend that the rights and obligations of the new contract be substituted for the terms and conditions of the old contract.” (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [118 Cal.Rptr. 695].)
- “While the evidence in support of a novation must be ‘clear and convincing,’ the ‘whole question is one of fact and depends upon all the facts and circumstances of the particular case,’ with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions.” (*Alexander, supra*, 37 Cal.2d at pp. 860–861, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 906–908

13 CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, *Contracts*, § 140.141 (Matthew Bender)

5 CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, *Contracts*, §§ 50.450–50.464 (Matthew Bender)

27 CALIFORNIA LEGAL FORMS, Ch. 77, *Discharge of Obligations*, §§ 77.20, 77.280–77.282 (Matthew Bender)

CONTRACTS

350. Introduction to Contract Damages (*Revised 2004*)

If you decide that *[name of plaintiff]* has proved *[his/her/its]* claim against *[name of defendant]* for breach of contract, you also must decide how much money will reasonably compensate *[name of plaintiff]* for the harm caused by the breach. This compensation is called “damages.” The purpose of such damages is to put *[name of plaintiff]* in as good a position as *[he/she/it]* would have been if *[name of defendant]* had performed as promised.

To recover damages for any harm, *[name of plaintiff]* must prove:

1. That the harm was likely to arise in the ordinary course of events from the breach of the contract; or
2. That when the contract was made, both parties could have reasonably foreseen the harm as the probable result of the breach.

[Name of plaintiff] also must prove the amount of *[his/her/its]* damages ~~to a reasonable certainty~~ according to the following instructions. However, *[He/She/It]* does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages. *[Name of plaintiff]* claims damages for *[identify general damages claimed]*.

Directions for Use

This instruction should be always be read before any of the following specific damages instructions.

Sources and Authority

- Civil Code section 3281 provides: “Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.”
- Civil Code section 3282 provides: “Detriment is a loss or harm suffered in person or property.”
- Civil Code section 3300 provides: “For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.”

- “The detriment that is ‘likely to result therefrom’ is that which is foreseeable to the breaching party at the time the contract is entered into.” (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)
- Civil Code section 3301 provides: “No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.”
- Civil Code section 3358 provides: “Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides.”
- Civil Code section 3359 provides: “Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”
- Restatement Second of Contracts, section 351 provides:
 - (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
 - (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
 - (a) in the ordinary course of events, or
 - (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
 - (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.
- “The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. The aim is to put the injured party in as good a position as he would have been had performance been rendered as promised. This aim can never be exactly attained yet that is the problem the trial court is required to resolve.” (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)
- “The damages awarded should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed, but such damage may not exceed the benefit which it would have received had the promisor performed.” (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, *supra*, 226 Cal.App.3d at p. 468, internal citations omitted.)

- “ ‘The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.’ ” (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, *supra*, 226 Cal.App.3d at p. 455, internal citation omitted.)
- “ ‘Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.’ ‘In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.’ ” (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)
- “California case law has long held the correct measure of damages to be as follows: ‘Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract. Damages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach when he made the contract.’ ” (*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 409 [251 Cal.Rptr. 17], internal citations omitted.)
- “ ‘It is often said that damages must be “foreseeable” to be recoverable for breach of contract. The seminal case announcing this doctrine, still generally accepted as a limitation on damages recoverable for breach of contract, is *Hadley v. Baxendale*. First, general damages are ordinarily confined to those which would naturally arise from the breach, or which might have been reasonably contemplated or foreseen by both parties, at the time they made the contract, as the probable result of the breach. Second, if special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.’ ” (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)
- “Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation.” (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)
- “It is well settled that the party claiming the damage must prove that he has suffered damage and prove the elements thereof with reasonable certainty.” (*Mendoyoma, Inc.*

v. County of Mendocino (1970) 8 Cal.App.3d 873, 880–881 [87 Cal.Rptr. 740], internal citation omitted.)

- “Whether the theory of recovery is breach of contract or tort, damages are limited to those proximately caused by their wrong.” (*State Farm Mutual Automobile Insurance Co. v. Allstate Insurance Co.* (1970) 9 Cal.App.3d 508, 528 [88 Cal.Rptr. 246], internal citation omitted.)
- “Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are ‘proximately caused’ by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain.” (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)
- “[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California.” (*Erllich v. Menezes, supra*, 21 Cal.4th 543 at p. 558, internal citations omitted.)
- “Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress.” (*Erllich v. Menezes, supra*, 21 Cal.4th at p. 559, internal citations omitted.)
- “The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years.” (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 813–822

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9

13 California Forms of Pleading and Practice, Ch. 140, Contracts, §§ 140.55–140.56, 140.100–140.106 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

5 California Points and Authorities, Ch. 50, Contracts, §§ 50.10–50.11 (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

CONTRACTS

VF-303. Breach of Contract—Contract Formation at Issue (*New 2004*)

We answer the questions submitted to us as follows:

1. Were the contract terms clear enough so that the parties could understand what each was required to do?

___Yes

___No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the parties agree to give each other something of value?

___Yes

___No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the parties agree to the terms of the contract?

___Yes

___No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/it] to do?

___Yes

___No

If your answer to question 4 is yes, then skip question 5 and answer question 6. If you answered no, answer question 5.

5. Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?

___Yes

___No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did all the conditions occur that were required for *[name of defendant]*'s performance?

___Yes

___No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did *[name of defendant]* fail to do something that the contract required *[him/her/it]* to do?

___Yes

___No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was *[name of plaintiff]* harmed by that failure?

___Yes

___No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are *[name of plaintiff]*'s damages?

[a. Past economic loss: \$_____]

[b. Future economic loss: \$_____]

TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 302, *Contract Formation—Essential Factual Elements*, and Instruction 303, *Breach of Contract—Essential Factual Elements*. The elements concerning the parties' legal capacity and legal purpose will likely not be issues for the jury. If the jury is needed to make a factual determination regarding these issues, appropriate questions may be added to this verdict form.

If specificity is not required, users do not have to itemize all the damages listed in question 9. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

NEGLIGENCE

430. Causation: Substantial Factor (*Revised 2004*)

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

Directions for Use

As phrased, this definition of “substantial factor” subsumes the “but for” test of causation, e.g., plaintiff must prove that but for defendant’s conduct, the same harm would not have occurred. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239–1240 [135 Cal.Rptr.2d 629].) The first sentence of the instruction accounts for the “but for” concept. Conduct does not “contribute” to harm if the same harm would have occurred without such conduct. “Conduct,” in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff’s alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The “but for” test does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049 [1 Cal.Rptr. 2d 913, 819 P.2d 872].)

In asbestos-related cancer cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires an additional instruction regarding exposure to a particular product. See Instruction 435, Causation for Asbestos-Related Cancer Claims.

Tentative Draft No. 3 (April 7, 2003) for the Restatement Third of Torts, in its treatment of Torts: Liability for Physical Harm (Basic Principles), section 29, proposes a “scope of liability” approach that de-emphasizes causation and focuses on (1) the nature of the harms that are within the scope of the risk created by the actor’s conduct and (2) whether those harms resulted from the risk; this Restatement is not final, and it has not been subject to California judicial review.

Sources and Authority

- *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398]; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 [1 Cal.Rptr.2d 913, 819 P.2d 872].

- “However the test is phrased, causation in fact is ultimately a matter of probability and common sense.” (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d of Torts, § 433B, com. b.)
- *Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1313–1314 [37 Cal.Rptr.2d 541].
- Restatement Second of Torts, section 431, provides: “The actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.” This section “correctly states California law as to the issue of causation in tort cases.” (*Wilson v. Blue Cross of Southern California* (1990) 222 Cal.App.3d 660, 673 [271 Cal.Rptr. 876].)
- This instruction incorporates Restatement Second of Torts, section 431, comment a, which provides, in part: “The word ‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called ‘philosophic sense’ which includes every one of the great number of events without which any happening would not have occurred.”

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 968, pp. 358–359, id. (2002 supp.) Torts, § 968A, pp. 253–256

1 Levy et al., California Torts, Ch. 2, Causation, § 2.02 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 1.13–1.15

4 California Trial Guide, Unit 90, Closing Argument, § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.22, Ch. 7, Proof, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, Negligence (Matthew Bender)

16 California Points and Authorities, Ch. 165, Negligence, §§ 165.260–165.263 (Matthew Bender)

MEDICAL NEGLIGENCE

501. Standard of Care for Health Care Professionals (*Revised 2004*)

A [insert type of medical practitioner] is negligent if [he/she] fails to ~~exercise~~ use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [insert type of medical practitioners] would ~~possess and use~~ in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

~~[When you are deciding whether [name of defendant] was negligent, y~~You must determine the level of skill, knowledge, and care that other reasonably careful [insert type of medical practitioners] would use in similar circumstances based ~~your decision only on the testimony of the expert witnesses [including [name of defendant]] who have testified in this case.]~~

Directions for Use

This instruction is intended to apply to nonspecialist physicians, surgeons, and dentists. The standards of care for nurses, specialists, and hospitals are addressed in separate instructions.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

See Instructions 219–221 on evaluating the credibility of expert witnesses.

Sources and Authority

- “With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances.” (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408 [131 Cal.Rptr. 69, 551 P.2d 389]; see also *Brown v. Colm* (1974) 11 Cal.3d 639, 642–643 [114 Cal.Rptr. 128, 552 P.2d 688].)
- “The courts require only that physicians and surgeons exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances.” (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36 [210 Cal.Rptr. 762, 694 P.2d 1134].)
- In *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1119–1120 [267 Cal.Rptr. 503] (disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228 [23 Cal.Rptr.2d 397, 859 P.2d 96]), the court observed that failure to possess the requisite level of knowledge and skill is

negligence, although a breach of this portion of the standard of care does not, by itself, establish actionable malpractice.

- “The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen.” (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 [6 Cal.Rptr.2d 900].)
- “ ‘Ordinarily, the standard of care required of a doctor, and whether he exercised such care, can be established only by the testimony of experts in the field.’ ‘But to that rule there is an exception that is as well settled as the rule itself, and that is where “negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact.” ’ ” (*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86], internal citations omitted.)
- “We have already held upon authority that the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of materia medica or surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. The layman needs no scientific enlightenment to see at once that the omission can be accounted for on no other theory than that someone has committed actionable negligence.” (*Ales v. Ryan* (1936) 8 Cal.2d 82, 93 [64 P.2d 409].)
- The medical malpractice standard of care applies to veterinarians. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425 [89 Cal.Rptr.2d 868].)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 774, 792, pp. 113, 137
3 Levy et al., California Torts, Ch. 30, General Principles of Liability of Professionals, § 30.12, Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.11 (Matthew Bender)
California Tort Guide (Cont.Ed.Bar 1996) § 9.1
17 California Forms of Pleading and Practice, Ch. 209, Dentists, § 209.42 (Matthew Bender)
25 California Forms of Pleading and Practice, Ch. 295, Hospitals, §§ 295.13, 295.43, 295.45 (Matthew Bender)
36 California Forms of Pleading and Practice, Ch. 414, Physicians and Other Medical Personnel (Matthew Bender)
17 California Points and Authorities, Ch. 175, Physicians and Surgeons (Matthew Bender)

MEDICAL NEGLIGENCE

502. Standard of Care for Medical Specialists (*Revised 2004*)

A [insert type of medical specialist] is negligent if [he/she] fails to ~~exercise~~ use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [insert type of medical specialists] would ~~possess and use~~ in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

~~[When you are deciding whether [name of defendant] was negligent, y~~You must determine the level of skill, knowledge, and care that other reasonably careful [insert type of medical specialists] would use in similar circumstances based ~~your decision only on the testimony of the expert witnesses [including [name of defendant]] who have testified in this case.]~~

Directions for Use

This instruction is intended to apply to physicians, surgeons, and dentists who are specialists in a particular practice area.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

See Instructions 219–221 on evaluating the credibility of expert witnesses.

Sources and Authority

- Specialists, such as anesthesiologists and ophthalmologists, are “held to that standard of learning and skill normally possessed by such specialists in the same or similar locality under the same or similar circumstances.” (*Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 159–160 [41 Cal.Rptr. 577, 397 P.2d 161].) This standard adds a further level to the general standard of care for medical professionals: “In the first place, the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care but to use the skill, prudence, and diligence commonly exercised by practitioners of his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists.” (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188 [98 Cal.Rptr. 837, 491 P.2d 421].)
- California imposes a “higher standard of care upon physicians with a specialized practice.” (*Neel, supra*, 6 Cal.3d 176 at p. 188, fn. 22.) This higher standard refers to the level of skill that must be exercised, not to the standard of care. (*Valentine v. Kaiser Foundation Hospitals* (1961) 194 Cal.App.2d 282, 294 [15 Cal.Rptr. 26])

(disapproved on other grounds by *Siverson v. Weber* (1962) 57 Cal.2d 834, 839 [22 Cal.Rptr. 337, 372 P.2d 97]).)

- Psychotherapists are considered specialists in their field. (*Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 438 [131 Cal.Rptr. 14, 551 P.2d 334]; *Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 505 [71 Cal.Rptr.2d 552].)

Secondary Sources

3 Levy et al., California Torts, Ch. 30, General Principles of Liability of Professionals, § 30.12 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) § 9.2

36 California Forms of Pleading and Practice, Ch. 414, Physicians and Other Medical Personnel (Matthew Bender)

MEDICAL NEGLIGENCE

504. Standard of Care for Nurses (*Revised 2004*)

A [insert type of nurse] is negligent if [he/she] fails to ~~exereise~~ use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [insert type of nurses] would ~~possess and~~ use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

~~[When you are deciding whether [name of defendant] was negligent, y~~You must determine the level of skill, knowledge, and care that other reasonably careful [insert type of nurses] would use in similar circumstances based ~~your decision only on the testimony of the expert witnesses [including [name of defendant]] who have testified in this case.]~~

Directions for Use

The appropriate level of nurse should be inserted where indicated—i.e., registered nurse, licensed vocational nurse, nurse practitioner: “Today’s nurses are held to strict professional standards of knowledge and performance, although there are still varying levels of competence relating to education and experience.” (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 342 [160 Cal.Rptr. 246].)

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

Sources and Authority

- “The adequacy of a nurse’s performance is tested with reference to the performance of the other nurses, just as is the case with doctors.” (*Fraijo, supra*, 99 Cal.App.3d at p. 341.)
- Courts have held that “a nurse’s conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances.” (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 [6 Cal.Rptr.2d 900].)
- The jury should not be instructed that the standard of care for a nurse practitioner must be measured by the standard of care for a physician or surgeon when the nurse is examining a patient or making a diagnosis. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 150 [211 Cal.Rptr. 368, 695 P.2d 665].) Courts have observed that nurses are trained, “but to a lesser degree than a physician, in the recognition of the symptoms of diseases and injuries.” (*Cooper v. National Motor Bearing Co.* (1955) 136 Cal.App.2d 229, 238 [288 P.2d 581].)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 804, p. 155

California Tort Guide (Cont.Ed.Bar 1996) § 9.52

36 California Forms of Pleading and Practice, Ch. 414, Physicians and Other Medical Personnel (Matthew Bender)

17 California Points and Authorities, Ch. 175, Physicians and Surgeons (Matthew Bender)

530. Medical Battery (*Revised 2004*)

A ~~[insert type of medical practitioner]~~ commits a battery if: *[Name of plaintiff]* claims that *[name of defendant]* committed a battery. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. ~~[He or she]~~ That *[name of defendant]* performed a medical procedure without the patient's *[name of plaintiff]*'s consent; [or]

~~[The patient]~~ That *[name of plaintiff]* consented to one medical procedure, but the ~~[insert type of medical practitioner]~~ *[name of defendant]* performed a substantially different medical procedure; [or]

~~[The patient]~~ That *[name of plaintiff]* consented to a medical procedure, but only on the condition that ~~something else happens~~ *[describe what had to occur before consent would be given]*, and the ~~[insert type of medical practitioner]~~ *[name of defendant]* proceeded ~~even though that condition does not happen without such occurring.~~

2. That *[name of plaintiff]* was harmed; and

3. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

A patient can consent to a medical procedure by words or conduct.

Directions for Use

One or more of the three bracketed options in the first element should be selected, depending on the nature of the case.

Sources and Authority

- Battery may also be found if a substantially different procedure is performed: “Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery.” (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239 [104 Cal.Rptr. 505, 502 P.2d 1].)
- Battery may also be found if a conditional consent is violated: “[I]t is well recognized a person may place conditions on [his or her] consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for

the excessive act.” (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 610 [278 Cal.Rptr. 900].)

- “Confusion may arise in the area of ‘exceeding a patient’s consent.’ In cases where a doctor exceeds the consent and such excess surgery is found necessary due to conditions arising during an operation which endanger the patient’s health or life, the consent is presumed. The surgery necessitated is proper (though exceeding specific consent) on the theory of assumed consent, were the patient made aware of the additional need.” (*Pedsky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123 [59 Cal.Rptr. 294].)
- “Consent to medical care, including surgery, may be express or may be implied from the circumstances.” (*Bradford v. Winter* (1963) 215 Cal.App.2d 448, 454 [30 Cal.Rptr. 243].)
- “It is elemental that consent may be manifested by acts or conduct and need not necessarily be shown by a writing or by express words. [Citations.]” (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38–39 [224 P.2d 808].)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 352–562, pp. 439–658

3 Levy et al., California Torts, Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.41, Ch. 41, Assault and Battery (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 9.11–9.16

6 California Forms of Pleading and Practice, Ch. 58, Assault and Battery, § 58.14, Ch. 414, Physicians and Other Medical Personnel (Matthew Bender)

2 California Points and Authorities, Ch. 21, Assault and Battery (Matthew Bender)

17 California Points and Authorities, Ch. 175, Physicians and Surgeons (Matthew Bender)

33 California Legal Forms, Ch. 104, Health Care Transactions, Consents, And Directives, § 104.11 (Matthew Bender)

PROFESSIONAL NEGLIGENCE

600. Standard of Care (*Revised 2004*)

A [insert type of professional] is negligent if [he/she] fails to use the skill and care that a reasonably careful [insert type of professional] would have used in similar circumstances. **This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”**

~~[When you are deciding whether [name of defendant] was negligent, y~~**You must determine the level of skill and care that other reasonably careful [insert type of professionals] would use in similar circumstances based your decision only on the testimony of the expert witnesses [including [name of defendant]] who have testified in this case.]**

Directions for Use

See Instruction 400, *Essential Factual Elements (Negligence)* for an instruction on the plaintiff’s burden of proof. In legal or other nonmedical professional malpractice cases, the word “legal” or “professional” should be added before the word “negligence” in the first paragraph of Instruction 400. (See Sources and Authority following Instruction 500, *Essential Factual Elements (Medical Negligence)*.)

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary.

See Instructions 219–221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist’s expertise is determined by expert testimony. (*Id.* at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid.*) Special instructions may need to be crafted for that purpose.

Sources and Authority

- The elements of a cause of action in tort for professional negligence are: “(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4)

actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433]; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 699 [91 Cal.Rptr.2d 844].)

- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)
- Attorneys fall below the standard of care for attorney malpractice if "their advice and actions were so legally deficient when given that it demonstrates a failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performing the tasks they undertake." (*Unigard Insurance Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1237 [45 Cal.Rptr.2d 565]; see also *Lucas v. Hamm* (1961) 56 Cal.2d 583, 591– 592 [15 Cal.Rptr. 821, 364 P.2d 685], cert. denied, 368 U.S. 987.)
- Rules of Professional Conduct, Rule 3-110 (Failing to Act Competently) provides:
 - (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
 - (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
 - (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.
- Lawyers who hold themselves out as specialists "must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra*, 47 Cal.App.3d at p. 810.) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810–811.)
- If the failure to exercise due care is so clear that a trier of fact may find professional negligence without expert assistance, then expert testimony is not required: " 'In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768] [internal citations omitted].)

Secondary Sources

1 Witkin, *California Procedure* (4th ed. 1996) Attorneys, §§ 315–318, pp. 385–387

6 Witkin, *Summary of California Law* (9th ed. 1988), Torts, §§ 804–805, pp. 155–160

1 Levy et al., California Torts, Ch. 1, Negligence: Duty and Breach, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, General Principles of Liability of Professionals, §§ 30.12, 30.13, Ch. 32, Liability of Attorneys, § 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, Attorney Professional Liability, Ch. 380, Negligence (Matthew Bender)

2 California Points and Authorities, Ch. 24, Attorneys at Law (Matthew Bender)

MOTOR VEHICLE AND HIGHWAY SAFETY

722. Adult's Liability for Minor's Permissive Use of Motor Vehicle (Revised 2004)

[Name of plaintiff] claims that [he/she] was harmed and that [name of defendant] is responsible for the harm because [name of defendant] gave [name of minor] permission to operate the vehicle. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of minor] was negligent in operating the vehicle;
 2. That [name of plaintiff] was harmed;
 3. That [name of minor]'s negligence was a substantial factor in causing the harm; and
 4. ~~That at the time of the collision [name of defendant] had a right to control [name of minor]; and~~
 54. That [name of defendant], by words or conduct, gave [name of minor] permission to use the vehicle.
-

Directions for Use

Under Vehicle Code section 17708, an element of this cause of action is that the defendant must have "custody" of the minor driver. The instruction omits this element because it will most likely be stipulated to or decided by the judge as a matter of law. If there are contested issues of fact regarding this element, this instruction may be augmented to include the specific factual findings necessary to arrive at a determination of custody.

Sources and Authority

- Vehicle Code section 17708 provides: "Any civil liability of a minor, whether licensed or not under this code, arising out of his driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor is hereby imposed upon the parents, person, or guardian and the parents, person, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle."
- "[I]t was incumbent upon [plaintiffs], in order to fasten liability upon [the parents] for the minor's negligence, to establish two necessary facts. These facts were, first, that at the time the collision occurred respondents had custody of the minor and, second,

that they had given to the minor their permission, either express or implied, to his driving the automobile by the negligent operation of which the injuries were caused.” (*Sommers v. Van Der Linden* (1938) 24 Cal.App.2d 375, 380 [75 P.2d 83].)

- “Whether or not a sufficient custody existed, within the meaning of the statute, might well depend upon evidence of specific facts showing the nature, kind and extent of the custody and right of control which the respondent [grandfather] actually had.” (*Hughes v. Wardwell* (1953) 117 Cal.App.2d 406, 409 [255 P.2d 881].)
- “In the absence of statute, ordinarily a parent is not liable for the torts of his minor child. A parent, however, becomes liable for the torts of his minor child if that child in committing a tort is his agent and acting within the child’s authority.” (*Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904–905 [151 Cal.Rptr. 456], internal citations omitted.)
- “ ‘[P]erson * * * having custody of the minor’ means person having permanent legal custody, and not a person such as a school teacher whose control over his pupils is limited in time and scope.” (*Hathaway v. Siskiyou Union High School Dist.* (1944) 66 Cal.App.2d 103, 114 [151 P.2d 861])

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1987) Torts, §§ 1025–1027, pp. 418–421; *id.* (2002 supp.) at §§ 1025–1026, pp. 289–290

2 Levy et al., California Torts, Ch. 20, Motor Vehicles, § 20.30[1] (Matthew Bender)
California Tort Guide (Cont.Ed.Bar 3d ed. 1996) Automobiles, §§ 4.42– 4.43, pp. 120–121

8 California Forms of Pleading and Practice, Ch. 82, Automobiles: Causes of Action, § 82.16, Ch. 83, Automobiles: Bringing the Action, § 83.133 (Matthew Bender)

1 Bancroft-Whitney’s California Civil Practice: Torts (1992) Motor Vehicles, § 25.52, pp. 77–78

MOTOR VEHICLE AND HIGHWAY SAFETY

VF-702. Adult's Liability for Minor's Permissive Use of Motor Vehicle
(Revised 2004)

We answer the questions submitted to us as follows:

1. Was [name of minor] negligent in operating the vehicle?

___ Yes ___ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [name of minor]'s negligence a substantial factor in causing harm to [name of plaintiff]?

___ Yes ___ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- ~~3. At the time of the collision, did [name of defendant] have the right to control [name of minor]?~~

~~___ Yes ___ No~~

~~If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.~~

- ~~43. Did [name of defendant], by words or conduct, give [name of minor] permission to use the vehicle?~~

~~___ Yes ___ No~~

~~If your answer to question 43 is yes, then answer question 54. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.~~

- ~~54. What are [name of plaintiff]'s damages?~~

~~[a. Past economic loss, including [lost earnings/
lost profits/medical expenses:] \$ _____]~~

- [b. Future economic loss, including [lost earnings/lost profits/lost earning capacity/ medical expenses:] \$ _____]
- [c. Past noneconomic loss, including [physical pain/mental suffering:] \$ _____]
- [d. Future noneconomic loss, including [physical pain/mental suffering:] \$ _____]

TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 722, *Adult's Liability for Minor's Permissive Use of Motor Vehicle*.

If specificity is not required, users do not have to itemize all the damages listed in question 54 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

VICARIOUS RESPONSIBILITY

3713. Nondelegable Duty (New 2004)

[Insert name, popular name, or number of regulation, statute or ordinance] **states:**

[Insert requirements of regulation, statute, or ordinance]

If [name of plaintiff] proves that [name of independent contractor] did not comply with this law, then [name of defendant] is responsible for any harm caused by this failure unless [name of defendant] proves both of the following:

- 1. That [he/she/it] did what would be expected of a reasonably careful person acting under similar circumstances who wanted to comply with this law; and**
 - 2. That the failure to comply with this law was not due to [name of independent contractor]'s negligence.**
-

Sources and Authority

- “A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor.” (*Felmler v. Falcon Cable Co.* (1995) 36 Cal.App.4th 1032, 1036 [43 Cal.Rptr.2d 158], internal citation omitted.)
- “The law has long recognized one party may owe a duty to another which, for public policy reasons, cannot be delegated. Such nondelegable duties derive from statutes, contracts, and common law precedents. Courts have held a party owing such a duty cannot escape liability for its breach simply by hiring an independent contractor to perform it.” (*Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455 [283 Cal.Rptr.2d 463], internal citations omitted.)
- “The rationale of the nondelegable duty rule is ‘to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm[.]’ The ‘recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant’s activity[.]’ Thus, the nondelegable duty rule advances the same purposes as other forms of vicarious liability.” (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 [28 Cal.Rptr.2d 672], internal citations and footnote omitted.)
- *Felmler* noted “[n]ondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others[.]” but concluded that the municipal ordinance on which the plaintiff worker relied did not give rise to a

nondelegable duty because it did not concern specific safeguards. (*Felmlee, supra*, 36 Cal.App.4th at p. 1039.)

- “Unlike strict liability, a nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor.” (*Maloney v. Rath* (1968) 69 Cal. 2d 442, 446 [445 P.2d 513, 71 Cal. Rptr. 897].)
- A California public agency is subject to the imposition of a nondelegable duty in the same manner as any private individual. (Gov. Code, § 815.4; *Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 742 [14 Cal.Rptr.2d 553].)
- “It is undisputable that ‘[t]he question of duty is . . . a legal question to be determined by the court.’ ” (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1184 internal citation omitted.) “When a court finds that a defendant has a nondelegable duty as a matter of law, the instruction given by the court should specifically inform the jurors of that fact and not leave them to speculate on the subject.” (*Id.* at p. 1187, fn. 5.)
- Restatement Second of Torts section 424 provides: “One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.
- “ ‘Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. . . . It is immaterial whether the duty thus regarded as “nondelegable” be imposed by statute, charter or by common law.’ ” (*Snyder v. Southern California Edison Co.* (1955) 44 Cal.2d 793, 800 [285 P.2d 910], internal citation omitted.)
- “[T]o establish a defense to liability for damages caused by a brake failure, the owner and operator must establish not only that ‘ “he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law” ’ but also that the failure was not owing to the negligence of any agent, whether employee or independent contractor, employed by him to inspect or repair the brakes.” (*Clark v. Dziabas* (1968) 69 Cal.2d 449, 451 [445 P.2d 517, 71 Cal.Rptr. 901], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law, (9th ed. 1990) Torts, § 1017, p. 301

PREMISES LIABILITY

1012. Knowledge Of Employee Imputed To Owner (*New 2004*)

If you find that the condition causing the risk of harm was created by [name of defendant] or [his/her/its] employee acting within the scope of [his/her] employment then you must conclude that [name of defendant] knew of this condition.

Sources and Authority

- “Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him.” (*Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 806 [117 P.2d 841], internal citation omitted.)
- “When an unsafe condition which causes injury to an invitee has been created by the owner of the property himself or by an employee within the scope of his employment, the invitee need not prove the owner's notice or knowledge of the dangerous condition; the knowledge is imputed to the owner.” (*Sanders v. MacFarlane's Candies* (1953) 119 Cal.App.2d 497, 501 [259 P.2d 1010], internal citation omitted.)
- “Where the evidence shows, as it does in this case, that the condition which caused the injury was created by the employees of the respondent, or the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the respondent, then respondent is charged with notice of the dangerous condition.” (*Oldham v. Atchison, T. & S.F. Ry. Co.* (1948) 85 Cal.App.2d 214, 218-219 [192 P.2d 516].)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1990) Torts, § 925, p. 296

PRODUCTS LIABILITY

1223. Negligence (Recall/Retrofit) (Revised 2004)

[Name of plaintiff] claims that [name of defendant] was negligent because [he/she/it] failed to [recall/retrofit] the [product]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [manufactured/ distributed/sold] the [product];
2. That [name of defendant] knew or reasonably should have known that the [product] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;
3. That [name of defendant] became aware of this defect after the [product] was sold;
4. That [name of defendant] failed to [recall/retrofit] [or warn of the danger of] the [product];
5. That a reasonable [manufacturer/distributor/ seller] under the same or similar circumstances would have [recalled/retrofitted] the [product];
6. That [name of plaintiff] was harmed; and
7. That [name of defendant]'s failure to [recall/retrofit] the [product] was a substantial factor in causing [name of plaintiff]'s harm.

~~A product manufacturer or supplier that knows of a dangerous defect in a previously sold product is required to use reasonable care under the circumstances. In deciding whether [name of defendant] used reasonable care, you should consider, among other factors, the following:~~

- ~~(a) Whether [name of defendant] provided an adequate warning of the [product]'s danger;~~
 - ~~(b) Whether [name of defendant] recalled the [product]; [and]~~
 - ~~(c) Whether [name of defendant] corrected the defect in the [product]; [and]~~
 - ~~(d) [insert other applicable factor].~~
-

Directions for Use

If the issue concerns a negligently conducted recall, modify this instruction accordingly.

Sources and Authority

- “Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design.” (*Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1827 [34 Cal.Rptr.2d 732], internal citation omitted.)
- In *Lunghi v. Clark Equipment Co.* (1984) 153 Cal.App.3d 485 [200 Cal.Rptr. 387], the court observed that, where the evidence showed that the manufacturer became aware of dangers after the product had been on the market, the jury “could still have found that Clark’s knowledge of the injuries caused by these features imposed a duty to warn of the danger, and/or a duty to conduct an adequate retrofit campaign.” The failure to meet the standard of reasonable care with regard to either of these duties could have supported a finding of negligence. (*Id.* at p. 494.)
- In *Balido v. Improved Machinery, Inc.* (1972) 29 Cal.App.3d 633 [105 Cal.Rptr. 890] (disapproved on other grounds in *Regents of University of California v. Hartford Accident & Indemnity Co.* (1978) 21 Cal.3d 624, 641–642 [147 Cal.Rptr. 486, 581 P.2d 197]), the court concluded that a jury could reasonably have found negligence based upon the manufacturer’s failure to retrofit equipment determined to be unsafe after it was sold, even though the manufacturer told the equipment’s owners of the safety problems and offered to correct those problems for \$500. (*Id.* at p. 649.)
- If a customer fails to comply with a recall notice, this will not automatically absolve the manufacturer from liability: “A manufacturer cannot delegate responsibility for the safety of its product to dealers, much less purchasers.” (*Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1562–1563 [71 Cal.Rptr.2d 190], internal citations omitted.)

PRODUCTS LIABILITY

**VF-1201. Strict Products Liability—Design Defect—Consumer Expectation
Test (Revised 2004)**

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [product]?

Yes_____

No_____

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. At the time the [product] was used, was it substantially the same as when it left [*name of defendant*]'s possession?

Yes_____

No_____

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the [product] fail to perform as safely as an ordinary consumer would have expected?

Yes_____

No_____

If your answer to question 3 is ~~no~~ yes, then answer question 4. If you answered yes no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the [product] used [or misused] in a way that was reasonably foreseeable to [*name of defendant*]?

Yes_____

No_____

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was the [product]'s design a substantial factor in causing harm to [*name of plaintiff*]?

Yes _____

No _____

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [name of plaintiff]'s damages?

[a. Past economic loss, including [lost earnings/
lost profits/medical expenses:] \$ _____]

[b. Future economic loss, including [lost
earnings/lost profits/lost earning capacity/
medical expenses:] \$ _____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on Instruction 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*.

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further. If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

ASSAULT AND BATTERY

1300. Battery—Essential Factual Elements (*Revised 2004*)

[*Name of plaintiff*] **claims that** [*name of defendant*] **committed a battery. To establish this claim, [*name of plaintiff*] must prove all of the following:**

- 1. That [*name of defendant*] [touched [*name of plaintiff*]] [or] [caused [*name of plaintiff*] to be touched] with the intent to harm or offend [him/her];**
- 2. That [*name of plaintiff*] did not consent to ~~be touched~~ the touching; and**
- 3. That [*name of plaintiff*] was harmed [or offended] by [*name of defendant*]'s conduct; [and]**
- [4. That a reasonable person in [*name of plaintiff*]'s situation would have been offended by the touching.]**

~~[A touching is offensive if it offends a reasonable sense of personal dignity.]~~

Directions for Use

Give the bracketed words in element 3 and the last bracketed paragraph element only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of “intent,” see Instruction 1320, *Intent*.

Sources and Authority

- “A battery is any intentional, unlawful and harmful contact by one person with the person of another. . . . A harmful contact, intentionally done is the essence of a battery. A contact is ‘unlawful’ if it is unconsented to.” (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 611 [278 Cal.Rptr. 900], internal citations omitted.)
- “A battery is a violation of an individual’s interest in freedom from intentional, unlawful, harmful or offensive unconsented contacts with his or her person.” (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)
- “Although it is not incorrect to say that battery is an unlawful touching, . . . it is redundant to use ‘unlawful’ in defining battery in a jury instruction, and may be misleading to do so without informing the jury what would make the conduct unlawful.” (*Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 45 [31 Cal.Rptr.2d 259], internal citation omitted.)

- “The crimes of assault and battery are intentional torts. In the perpetration of such crimes negligence is not involved. As between the guilty aggressor and the person attacked the former may not shield himself behind the charge that his victim may have been guilty of contributory negligence, for such a plea is unavailable to him.” (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 385 [59 Cal.Rptr. 382].)
- Restatement Second of Torts, section 13 provides:
An actor is subject to liability to another for battery if
 - (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
 - (b) a harmful contact with the person of the other directly or indirectly results.
- “ ‘It has long been established, both in tort and criminal law, that “the least touching” may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.’ ” (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 88 [245 Cal.Rptr. 800], internal citations omitted.)
- Civil Code section 3515 provides: “He who consents to an act is not wronged by it.”
- “The element of lack of consent to the particular contact is an essential element of battery.” (*Rains, supra*, 150 Cal.App.3d at p. 938.)
- “As a general rule, one who consents to a touching cannot recover in an action for battery. . . . However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act.” (*Ashcraft, supra*, 228 Cal.App.3d at pp. 609–610.)
- “In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a ‘willful disregard’ of the plaintiff’s rights.” (*Ashcraft, supra*, 228 Cal.App.3d at p. 613, internal citation omitted.)
- Restatement Second of Torts, section 19 provides: “A bodily contact is offensive if it offends a reasonable sense of personal dignity.”
- “ ‘The usages of decent society determine what is offensive.’ ” (*Barouh, supra*, 26 Cal.App.4th at p. 46, fn. 5, internal citation omitted.)
- “Even though pushing a door cannot be deemed a harmful injury, the pushing of a door which was touching the prosecutrix could be deemed an offensive touching and a battery is defined as a harmful or offensive touching.” (*People v. Puckett* (1975) 44 Cal.App.3d 607, 614–615 [118 Cal.Rptr. 884].)

- “ ‘If defendant unlawfully aims at one person and hits another he is guilty of assault and battery on the party he hit, the injury being the direct, natural and probable consequence of the wrongful act.’ ” (*Singer v. Marx* (1956) 144 Cal.App.2d 637, 642 [301 P.2d 440], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 346–368

3 Levy et al., California Torts, Ch. 41, Assault and Battery, § 41.01[3] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, Assault and Battery, § 58.13 (Matthew Bender)

2 California Points and Authorities, Ch. 21, Assault and Battery (Matthew Bender)

ASSAULT AND BATTERY

1301. Assault—Essential Factual Elements (*Revised 2004*)

[*Name of plaintiff*] **claims that** [*name of defendant*] **assaulted** [him/her]. To establish this claim, [*name of plaintiff*] **must prove all of the following:**

1. [That [*name of defendant*] **intentionally did an act that made** [*name of plaintiff*] **reasonably believe that** [he/she] **was about to be touched in a harmful [or offensive] manner;**]

[or]

[That [*name of defendant*] **threatened to touch** [*name of plaintiff*] **in a harmful [or offensive] manner, and that it reasonably appeared to** [*name of plaintiff*] **that** [he/she] **was about to carry out the threat;**]

2. That a reasonable person in [*name of plaintiff*]'s situation would have been offended by the touching;

23. That [*name of plaintiff*] **did not consent to** [*name of defendant*]'s conduct;

34. That [*name of plaintiff*] **was harmed; and**

45. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

~~[A touching is offensive if it offends a reasonable sense of personal dignity.]~~

Directions for Use

Give the bracketed element 2 and the bracketed words in element 1 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of “intent”, see Instruction 1320, *Intent*.

Sources and Authority

- “ ‘Generally speaking, an assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present.’ A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm.” (*Lowry v. Standard Oil Co. of California* (1944) 63 Cal.App.2d 1, 6–7 [146 P.2d 57], internal citation omitted.)

- “The tort of assault is complete when the anticipation of harm occurs.” (*Kiseskey v. Carpenters’ Trust for Southern California* (1983) 144 Cal.App.3d 222, 232 [192 Cal.Rptr 492].)
- Restatement Second of Torts, section 21 provides:
 - (1) An actor is subject to liability to another for assault if
 - (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and
 - (b) the other is thereby put in such imminent apprehension.
 - (2) An action which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it, and, therefore would be negligent or reckless if the risk threatened bodily harm.
- Words alone do not amount to an assault. (*Tomblinson v. Nobile* (1951) 103 Cal.App.2d 266, 269 [229 P.2d 97].)
- Restatement Second of Torts, section 31 provides: “Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.”

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 346–368

3 Levy et al., California Torts, Ch. 41, Assault and Battery, § 41.01[4] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, Assault and Battery, § 58.15 (Matthew Bender)

2 California Points and Authorities, Ch. 21, Assault and Battery (Matthew Bender)

1 Bancroft-Whitney’s California Civil Practice (1992) Torts, §§ 12:3–12:6

ASSAULT AND BATTERY

VF-1300. Battery (Revised 2004)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [touch [*name of plaintiff*]] [or] [cause [*name of plaintiff*] to be touched] with the intent to harm or offend [him/her]?

Yes_____

No_____

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] consent to be touched?

Yes_____

No_____

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of plaintiff*] harmed [or offended] by [*name of defendant*]'s conduct?

Yes_____

No_____

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable person in [*name of plaintiff*]'s situation have been offended by the touching?

Yes_____

No_____

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

45. What are [*name of plaintiff*]'s damages?

[a. Past economic loss, including [lost earnings/
lost profits/medical expenses:]

\$_____]

[b. Future economic loss, including [lost
earnings/lost profits/lost earning capacity/

medical expenses:] \$ _____]
[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]
[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 1300, *Battery—Essential Factual Elements*.

Give the bracketed words in question 3 and bracketed question 4 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

If specificity is not required, users do not have to itemize all the damages listed in question 45 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

ASSAULT AND BATTERY

VF-1301. Battery—Self-Defense/Defense of Others at Issue (*Revised 2004*)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [touch [*name of plaintiff*]] [or] [cause [*name of plaintiff*] to be touched] with the intent to harm or offend [him/her]?

Yes_____

No_____

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did [*name of plaintiff*] consent to be touched?

Yes_____

No_____

If your answer to question 2 is no, then answer question 3. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of plaintiff*] harmed [or offended] by [*name of defendant*]'s conduct?

Yes_____

No_____

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Would a reasonable person in [*name of plaintiff*]'s situation have been offended by the touching?

Yes_____No_____

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

45. Did [*name of defendant*] reasonably believe that [*name of plaintiff*] was going to harm [him/her/[*insert identification of other person*]]?

Yes_____

No_____

If your answer to question 45 is yes, then answer question 56. If you answered no, skip question 56 and answer question 67.

56. Did [name of defendant] use only the amount of force that was reasonably necessary to protect [himself/herself/[insert identification of other person]]?

Yes _____

No _____

If your answer to question 56 is no, then answer question 67. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

67. What are [name of plaintiff]'s damages?

[a. Past economic loss, including [lost earnings/
lost profits/medical expenses:] \$ _____]

[b. Future economic loss, including [lost
earnings/lost profits/lost earning capacity/
medical expenses:] \$ _____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 1300, *Battery—Essential Factual Elements*, and Instruction 1304, *Self-Defense/Defense of Others*.

Give the bracketed words in question 3 and bracketed question 4 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

If specificity is not required, users do not have to itemize all the damages listed in question 67 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

ASSAULT AND BATTERY

VF-1302. Assault (*Revised 2004*)

We answer the questions submitted to us as follows:

- [1. Did *[name of defendant]* act, intending to cause a harmful or offensive contact with *[name of plaintiff]* or intending to place *[him/her]* in fear of a harmful or an offensive contact?**

Yes_____

No_____

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 2. Did *[name of plaintiff]* believe that *[he/she]* was about to be touched in a harmful *[or an offensive]* manner?**

Yes_____

No_____

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

- [1. Did *[name of defendant]* threaten to touch *[name of plaintiff]* in a harmful or an offensive manner?**

Yes_____

No_____

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 2. Did it reasonably appear to *[name of plaintiff]* that *[he/she]* was about to be touched in a harmful *[or an offensive]* manner?**

Yes_____

No_____

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

- [3. Would a reasonable person in *[name of plaintiff]*'s situation have been offended by the touching?**

Yes _____ No _____

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

34. Did [name of plaintiff] consent to [name of defendant]'s conduct?

Yes _____ No _____

If your answer to question 34 is no, then answer question 45. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

45. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?

Yes _____ No _____

If your answer to question 45 is yes, then answer question 56. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

56. What are [name of plaintiff]'s damages?

[a. Past economic loss, including [lost earnings/
lost profits/medical expenses:] \$ _____]

[b. Future economic loss, including [lost
earnings/lost profits/lost earning capacity/
medical expenses:] \$ _____]

[c. Past noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

[d. Future noneconomic loss, including [physical
pain/mental suffering:] \$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

As appropriate to the facts of the case, read one of the bracketed alternative sets of questions 1 and 2. This verdict form is based on Instruction 1301, *Assault—Essential Factual Elements*.

Give the bracketed words in question 2 and bracketed question 3 only if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

If specificity is not required, users do not have to itemize all the damages listed in question 56 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

FRAUD OR DECEIT

1901. Concealment (*Revised 2004*)

[Name of plaintiff] **claims that [he/she] was harmed because [name of defendant] concealed certain information. To establish this claim, [name of plaintiff] must prove all of the following:**

- [1. (a) That [name of defendant] and [name of plaintiff] were [insert type of fiduciary relationship, e.g., “business partners”]; and**
- (b) That [name of defendant] intentionally failed to disclose an important fact to [name of plaintiff];]**

[or]

- [1. That [name of defendant] disclosed some facts to [name of plaintiff] but intentionally failed to disclose [other/another] important fact(s), making the disclosure deceptive;]**

[or]

- [1. That [name of defendant] intentionally failed to disclose an important fact that was known only to [him/her/it] and that [name of plaintiff] could not have discovered;]**

[or]

- [1. That [name of defendant] actively concealed an important fact from [name of plaintiff] or prevented [him/her/it] from discovering that fact;]**

- 2. That [name of plaintiff] did not know of the concealed fact;**

- 3. That [name of defendant] intended to deceive [name of plaintiff] by concealing the fact;**

- 4. That [name of plaintiff] reasonably relied on [name of defendant]’s deception;**

- 5. That [name of plaintiff] was harmed; and**

- 6. That [name of defendant]’s concealment was a substantial factor in causing [name of plaintiff]’s harm.**
-

Directions for Use

Under the second, third, and fourth bracketed instructions under element 1, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, then the jury should also be instructed to determine whether the requisite relationship existed. Regarding the fourth bracketed instruction, the parties may wish to research whether active concealment alone is sufficient to support a cause of action for fraud in tort or whether it is merely grounds for voiding a contract under Civil Code section 1572 (see *Williams v. Graham* (1948) 83 Cal.App.2d 649, 652 [189 P.2d 324].)

Element 2 may be deleted if the third alternative bracketed instruction under element 1 is used.

Sources and Authority

- Civil Code section 1710 specifies four kinds of deceit. This instruction is derived from the third kind:

A deceit, within the meaning of [section 1709], is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be;
 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
 4. A promise, made without any intention of performing it.
- “[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.” (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613 [7 Cal.Rptr.2d 859].)
 - “There are ‘four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. ... Each of the [three nonfiduciary] circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise.

... [¶] ... [S]uch a relationship can only come into being as a result of some sort of transaction between the parties. ... Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.’ All of these relationships are created by transactions between parties from which a duty to disclose facts material to the transaction arises under certain circumstances.” (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336–337 [60 Cal.Rptr.2d 539], internal citations, italics, and footnote omitted.)

- “Ordinarily, failure to disclose material facts is not actionable fraud unless there is some fiduciary relationship giving rise to a duty to disclose ... [however,] ‘[t]he duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts which are not accessible to the plaintiff.’ ” (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482 [55 Cal.Rptr.2d 225] internal citations omitted.)
- “In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff.” (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294 [85 Cal.Rptr. 444], footnotes omitted.)
- “[A]ctive concealment of facts and mere nondisclosure of facts may under certain circumstances be actionable without [a fiduciary or confidential] relationship. For example, a duty to disclose may arise without a confidential or fiduciary relationship where the defendant, a real estate agent or broker, alone has knowledge of material facts which are not accessible to the plaintiff, a buyer of real property.” (*La Jolla Village Homeowners’ Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151 [261 Cal.Rptr. 146], internal citations omitted.)
- “Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead.” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907], internal citations omitted.)
- “[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, “if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure.” ’ ” (*Marketing West, Inc., supra*, 6 Cal.App.4th at p. 613, internal citation omitted.)

- “Contrary to plaintiffs’ assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently.” (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101].)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 697–703

3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.03[2][b]

CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, *Fraud and Deceit* (Matthew Bender)

CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, *Fraud and Deceit* (Matthew Bender)
2 Bancroft-Whitney’s California Civil Practice (1992) Torts, § 22:16

FRAUD OR DECEIT

1908. Reasonable Reliance (*Revised 2004*)

You must determine the reasonableness of [name of plaintiff]'s reliance by taking into account [his/her] mental capacity, knowledge, and experience.

Directions for Use

This instruction is appropriate for cases in which evidence of the plaintiff's greater or lesser personal knowledge, education, experience, or capacity has been introduced. Trial of class actions may require a different instruction. ~~In that context, the Supreme Court has held that the jury can find that plaintiff class's reliance was justified if plaintiff proves that a reasonable person in the relevant circumstances would have relied on the representation.~~ (See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814 n. 49 [94 Cal.Rptr. 796, 484 P.2d 964]; see also *Wilner v. Sunset Life Insurance Co.* (2000) 78 Cal.App.4th 952, 963 [93 Cal.Rptr.2d 413].) ~~In class cases, the following instruction would be appropriate in lieu of the instruction provided above: "If you find that a reasonable person would have relied upon [name of defendant]'s [misrepresentation/concealment], then you may conclude that [name of plaintiff]'s reliance was reasonable under the circumstances."~~

Sources and Authority

- "Whether reliance is justified is a question of fact for the determination of the trial court; the issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551, 674 P.2d 253], internal citations omitted.)
- The "leading case" (see *Blankenheim v. E.F. Hutton, Co.* (1990) 217 Cal.App.3d 1463, 1474 [266 Cal.Rptr. 593]) on justifiable reliance states: "Nor is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' " (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415 [115 P.2d 977], internal citations omitted.)

- “Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact. ‘What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind’ ” (*Blankenheim, supra*, 217 Cal.App.3d at p. 1475, internal citations omitted.)
- “[Plaintiff]’s deposition testimony on which appellants rely also reveals that she is a practicing attorney and uses releases in her practice. In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable.” (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843–844 [2 Cal.Rptr.2d 437], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 714–719

3 Levy, et al., California Torts (1985–2000) Fraud and Deceit and Other Business Torts, § 40.06 (Matthew Bender)

CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, Fraud and Deceit (Matthew Bender)

CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, Fraud and Deceit (Matthew Bender)

2 Bancroft-Whitney’s California Civil Practice (1992) Torts, § 22:32

INSURANCE LITIGATION

2308. Rescission for Misrepresentation or Concealment in Insurance Application—Essential Factual Elements (*Revised 2004*)

[Name of insurer] claims that no insurance contract was created because *[name of insured]* **[concealed an important fact/made a false representation]** in *[his/her/its]* application for insurance. To establish this claim, *[name of insurer]* must prove all of the following:

- 1. That *[name of insured]* submitted an application for insurance with *[name of insurer]*;**
 - 2. That in the application for insurance *[name of insured]* *[intentionally]* *[failed to state/represented]* that *[insert omission or alleged misrepresentation]*;**
 - 3. *[That the application asked for that information;]***
 - 4. That *[name of insured]* *[select one of the following:]* **[knew that *[insert omission]*];** **[knew that this representation was not true;]****
 - 5. That *[name of insurer]* would not have issued the insurance policy if *[name of insured]* had stated the true facts in the application;**
 - 6. That *[name of insurer]* gave *[name of insured]* notice that it was rescinding the insurance policy; and**
 - 7. That *[name of insurer]* *[returned/offered to return]* the insurance premiums paid by *[name of insured]*.**
-

Directions for Use

Use the bracketed word “intentionally” for cases involving Insurance Code section 2071.

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information. Elements 5 and 6 may be resolved by the language of the complaint, in which case these could be decided as a matter of law. (Civ. Code, § 1691.)

If the insured’s misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

If it is alleged that omission occurred in circumstances other than a written application, this instruction should be modified accordingly.

Sources and Authority

- Civil Code section 1689(b)(1) provides that a party may rescind a contract under the following circumstances: “If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.”
- Insurance Code section 650 provides: “Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract. The rescission shall apply to all insureds under the contract, including additional insureds, unless the contract provides otherwise.”
- Insurance Code section 330 provides: “Neglect to communicate that which a party knows, and ought to communicate, is concealment.”
- Insurance Code section 331 provides: “Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.”
- Insurance Code section 332 provides: “Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining.”
- Insurance Code section 334 provides: “Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.”
- Insurance Code section 338 provides: “An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.”
- Insurance Code section 359 provides: “If a representation is false in a material point . . . the injured party is entitled to rescind the contract from the time the representation becomes false.”
- “When the [automobile] insurer fails . . . to conduct . . . a reasonable investigation [of insurability] it cannot assert . . . a right of rescission” under section 650 of the Insurance Code as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674].)

- “[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law.” (*Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 915–916 [109 Cal.Rptr. 473, 513 P.2d 353], internal citations omitted.)
- “[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, [questions] concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.’ Finally, as the misrepresentation must be a material one, ‘incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer.’ And the trier of fact is not required to believe the ‘post mortem’ testimony of an insurer’s agents that insurance would have been refused had the true facts been disclosed.” (*Thompson, supra*, 9 Cal.3d at p. 916, internal citations omitted.)
- “[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer.” (*Thompson, supra*, 9 Cal.3d at p. 919.)
- “The materiality of a representation made in an application for a contract of insurance is determined by a subjective standard (i.e., its effect on the particular insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured’s violation of the standard fraud and concealment clause . . . , the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the objective standard of its effect upon a reasonable insurer.” (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], italics in original, internal citation omitted.)
- “Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive.” (*Fireman’s Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)
- “[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished” (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

- “The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. . . . [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received.” (*Imperial Casualty & Indemnity Co.*, *supra*, 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

2 California Insurance Law & Practice, Ch. 8, The Insurance Contract, § 8.10[1]
(Matthew Bender)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002)
Rescission and Reformation, §§ 21.2–21.12, 21.35–21.37, pp. 757– 764, 785–786

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002)
¶¶ 5:143–5:146, 5:153–5:159.1, 5:160–5:287, 15:241–15:256, pp. 5-27–5-28, 5-30–5-32,
5-32.1–5-54, 15-42–15-44

2 California Uninsured Motorist Law, Ch. 24, Bad Faith in Uninsured Motorist Law, §
24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender)

12 California Points and Authorities, Ch. 120, Insurance, §§ 120.250– 120.251, 120.260
(Matthew Bender)

INSURANCE LITIGATION

2336. Bad Faith—Unreasonable Failure to Defend—Essential Factual Elements (*New 2004*)

[Name of plaintiff] claims *[he/she/it]* was harmed by *[name of defendant]*'s breach of the obligation of good faith and fair dealing because it failed to defend *[name of plaintiff]* in a lawsuit that was brought against *[him/her/it]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

- 1. That *[name of plaintiff]* was insured under an insurance policy with *[name of defendant]*;**
 - 2. That a lawsuit was brought against *[name of plaintiff]*;**
 - 3. That *[name of plaintiff]* gave *[name of defendant]* timely notice that *[he/she/it]* had been sued;**
 - 4. That *[name of defendant]* unreasonably failed to defend *[name of plaintiff]* against the lawsuit;**
 - 5. That *[name of plaintiff]* was harmed; and**
 - 6. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**
-

Directions for Use

The instructions in this series assume the plaintiff is an insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

This instruction also assumes the judge will decide the issue of whether the claim was potentially covered by the policy. If there are factual disputes regarding this issue, a special interrogatory could be used.

For instructions regarding general breach of contract issues, refer to the Contracts series (Instruction 300 et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified. Note that an excess insurer generally owes no duty to defend without exhaustion of the primary coverage by judgment or settlement.

Sources and Authority

- “ ‘[T]he insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify.’ The duty to defend is a continuing one which arises on tender of the defense and lasts either until the conclusion of the underlying lawsuit or until the insurer can establish conclusively that there is no potential for coverage and therefore no duty to defend. The obligation of the insurer to defend is of vital importance to the insured. ‘In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.’ ‘The insured’s desire to secure the right to call on the insurer’s superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.’ ” (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)
- “An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend.” (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)
- “In order to rely on an insured’s lack of notice an insurer bears the burden of demonstrating that it was substantially prejudiced.” (*Select Insurance Co. v. Superior Court (Custer)*)(1990) 226 Cal.App.3d 631, 636 [276 Cal.Rptr. 598], internal citations omitted.)
- “In our view ... an insurer is not allowed to rely on an insured’s failure to perform a condition of a policy when the insurer has denied coverage because the insurer has, by denying coverage, demonstrated performance of the condition would not have altered its response to the claim.” (*Select Ins. Co., supra*, 226 Cal.App.3d at p. 637.)
- “A breach of the implied covenant may be predicated on the insurer’s breach of its duty to defend the insured, though the insurer’s conduct in such cases is commonly coupled with the breach of other aspects of the implied covenant, such as the duty to settle or to investigate The broad scope of the insurer’s duty to defend obliges it to accept the defense of ‘a suit which potentially seeks damages within the coverage of the policy’ A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, ‘[i]f the insurer’s refusal to defend is reasonable, no liability will result.’”

(Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)

- “No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense.” (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2003) ¶ 7:614.)

WORKERS' COMPENSATION

2800. Employer's Affirmative Defense—Injury Covered by Workers' Compensation (Revised 2004)

[Name of defendant] claims that *[he/she/it]* is not responsible for any harm that *[name of plaintiff]* may have suffered because *[he/ she]* was *[name of defendant]*'s employee and therefore can only recover under California's Workers' Compensation Act. To succeed, *[name of defendant]* must prove all of the following:

1. That *[name of plaintiff]* was *[name of defendant]*'s employee;
2. That *[name of defendant]* had workers' compensation insurance [covering *[name of plaintiff]* at the time of injury/was self-insured for workers' compensation claims [at the time of *[name of plaintiff]*'s injury]]; and
3. That *[name of plaintiff]*'s injury occurred while *[he/she]* was performing a task for or related to ~~*[name of defendant]*'s business~~ the work *[name of defendant]* hired *[him/her]* to do.

Any person performing services for another, other than as an independent contractor, is presumed to be an employee.

Directions for Use

This instruction is intended for cases where the plaintiff is suing a defendant claiming to be the plaintiff's employer. This instruction is not intended for use in cases where the plaintiff is suing under an exception to the workers' compensation exclusivity rule. For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Responsibility series (Instructions 3700–3726). These instructions may need to be modified to fit this context. Note that this instruction should not be given if the plaintiff/employee has been determined to fall within a statutory exception. For exceptions to Labor Code section 3351, see Labor Code section 3352.

If appropriate to the facts of the case, see instructions on the going-and-coming rule in the Vicarious Responsibility series. These instructions may need to be modified to fit this context.

Sources and Authority

- Labor Code section 3602(a) provides: "Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer, and

the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer."

- Labor Code section 3600(a) provides, in part: Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:
 - (1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.
 - (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.
 - (3) Where the injury is proximately caused by the employment, either with or without negligence.
- Labor Code section 3602(c) provides: "In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted."
- Labor Code section 3351 provides, in part: " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed."
- Labor Code section 3357 provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."
- Labor Code section 3706 provides: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply."
- "[T]he basis for the exclusivity rule in workers' compensation law is the 'presumed compensation bargain,' pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' " (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)

- “Employer conduct is considered outside the scope of the workers’ compensation scheme when the employer steps outside of its proper role, or engages in conduct unrelated to the employment relationship, that is not a normal incident of employment, or that violates a fundamental public policy.” (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 751 [57 Cal.Rptr.2d 821], internal citations omitted.)
- “Because an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving ‘that the (act) is a bar to the employee’s ordinary remedy,’ we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had ‘secured the payment of compensation’ in accordance with the provisions of the act.” (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98, fn. 8 [151 Cal.Rptr. 347, 587 P.2d 1160], internal citations omitted.)
- “A defendant need not plead and prove that it has purchased workers’ compensation insurance where the plaintiff alleges facts that otherwise bring the case within the exclusive province of workers’ compensation law, and no facts presented in the pleadings or at trial negate the workers’ compensation law’s application or the employer’s insurance coverage.” (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14 [87 Cal.Rptr.2d 554], internal citations omitted.)
- “[T]he fact that an employee has received workers compensation benefits from some source does not bar the employee’s civil action against an uninsured employer. Instead, ‘[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers’ compensation policy [and where the employer chooses] not to pay that price . . . it should not be immune from liability.’ ” (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987 [101 Cal.Rptr.2d 325], internal citations omitted.)
- “Under the Workers’ Compensation Act, employees are automatically entitled to recover benefits for injuries ‘arising out of and in the course of the employment.’ ‘When the conditions of compensation exist, recovery under the workers’ compensation scheme “is the exclusive remedy against an employer for injury or death of an employee.” ’ ” (*Piscitelli v. Friedenber* (2001) 87 Cal.App.4th 953, 986 [105 Cal.Rptr.2d 88], internal citations omitted.)
- “Unlike many other states, in California workers’ compensation provides the exclusive remedy for at least some intentional torts committed by an employer. *Fermino* described a ‘tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers’ compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.’ ”

(*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 723 [112 Cal.Rptr.2d 195], internal citations omitted.)

- “It has long been established in this jurisdiction that, generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers’ Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application.” (*Doney, supra*, 23 Cal.3d at p. 96, internal citations and footnote omitted.)
- “California courts have held worker’s compensation proceedings to be the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee’s injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee’s wrongful death, by an employee’s spouse for loss of the employee’s services or consortium, and for emotional distress suffered by a spouse in witnessing the employee’s injuries.” (*Snyder v. Michael’s Stores, Inc.* (1997) 16 Cal.4th 991, 997 [68 Cal.Rptr.2d 476, 945 P.2d 781], internal citations omitted.)
- “ ‘An employer-employee relationship must exist in order to bring the . . . Act into effect. (§ 3600)’ However, the coverage of the Act extends beyond those who have entered into ‘traditional contract[s] of hire.’ ‘[S]ection 3351 provides broadly that for the purpose of the . . . Act,’ ” “Employee” means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . ’ “Given this ‘section’s explicit use of the disjunctive,’ a contract of hire is not ‘a prerequisite’ to the existence of an employment relationship. Moreover, under section 3357, ‘[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded . . . , is presumed to be an employee.’ ” (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060–1061 [40 Cal.Rptr.2d 116, 892 P.2d 150], internal citations omitted.)
- “Given these broad statutory contours, we believe that an ‘employment’ relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen’s Compensation Act.” (*Laeng v. Workmen’s Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777 [100 Cal.Rptr. 377, 494 P.2d 1], internal citations omitted.)
- “[C]ourts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action.” (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 808 [247 Cal.Rptr. 347], internal citation omitted.)
- “The question of whether a person is an employee may be one of fact, of mixed law and fact, or of law only. Where the facts are undisputed, the question is one of law,

and the Court of Appeal may independently review those facts to determine the correct answer.” (*Barragan v. Workers’ Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [240 Cal.Rptr. 811], internal citations omitted.)

- “An employee may have more than one employer for purposes of workers’ compensation, and, in situations of dual employers, the second or ‘special’ employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or ‘general’ employer. Identifying and analyzing such situations ‘is one of the most ancient and complex questions of law in not only compensation but tort law.’ ” (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578 [239 Cal.Rptr. 578], internal citation omitted.)
- “In determining whether an employee is covered within the compensation system and thus entitled to recover compensation benefits, the ‘definitional reach of these covered employment relationships is very broad.’ A covered employee is ‘every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.’ ‘Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.’ . . . [T]hese provisions mandate a broad and generous interpretation in favor of inclusion in the system. Necessarily the other side of that coin is a presumption against the availability of a tort action where an employment relation exists. One result cannot exist without the other. Further, this result does not depend upon ‘informed consent,’ but rather on the parties’ legal status. . . . [W]here the facts of employment are not disputed, the existence of a covered relationship is a question of law.” (*Santa Cruz Poultry, Inc., supra*, 194 Cal.App.3d at pp. 583–584, internal citations omitted.)
- “Generally, ‘in the course of employment’ refers to the time and place of the injury. The phrase ‘arise out of employment’ refers to a causal connection between the employment and the injury.” (*Atascadero Unified School Dist. v. Workers’ Compensation Appeals Board* (2002) 98 Cal.App.4th 880, 883 [120 Cal.Rptr.2d 239].)
- “The concept of ‘scope of employment’ in tort is more restrictive than the phrase ‘arising out of and in the course of employment,’ used in workers’ compensation.” (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057 [103 Cal.Rptr.2d 790], internal citations omitted.)
- “Whether an employee’s injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case. However, where the facts are undisputed, resolution of the question becomes a matter of law.” (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 [115 Cal.Rptr.2d 503], internal citations omitted.)
- “ ‘The requirement of . . . section 3600 is twofold. On the one hand, the injury must occur “in the course of the employment.” This concept “ordinarily refers to the time,

place, and circumstances under which the injury occurs.” Thus “ ‘[a]n employee is in the “course of his employment” when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.’ ” And, ipso facto, an employee acts within the course of his employment when “ ‘performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.’ ” ’ [¶] “ ‘On the other hand, the statute requires that an injury “arise out of” the employment. . . . It has long been settled that for an injury to “arise out of the employment” it must “occur by reason of a condition or incident of [the] employment. . . .” That is, the employment and the injury must be linked in some causal fashion.’ ” (*LaTourette v. Workers’ Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184], internal citations and footnote omitted.)

- “Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are within the course of employment. The rationale is that the employee is still acting in furtherance of the employer’s business.” (*Wright, supra*, 95 Cal.App.4th at p. 354.)

Secondary Sources

2 Witkin, *Summary of California Law* (9th ed. 1987) *Workers’ Compensation*, §§ 25–29, 150–154, 161–165, 185–243, pp. 578–584, 719– 23, 731–736, 749–815

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.10 (Matthew Bender)

1 Levy et al., *California Torts*, Ch. 10, *Effect of Workers’ Compensation Law*, §§ 10.02, 10.03[3], 10.10 (Matthew Bender)

1 Hanna, *California Law of Employee Injuries and Workers’ Compensation* (2d ed. 1998) Ch. 4, §§ 4.03–4.06

1 Herlick, *California Workers’ Compensation Law* (6th Edition), Ch. 10, *The Injury*, § 10.09 (Matthew Bender)

51 California *Forms of Pleading and Practice*, Ch. 577, *Workers’ Compensation*, §§ 577.530, 577.310 (Matthew Bender)

10 California *Points and Authorities*, Ch. 100, *Employer and Employee* (Matthew Bender)

WORKERS' COMPENSATION

2810. Co-Employee's Affirmative Defense—Injury Covered by Workers' Compensation

[*Name of defendant*] claims that [he/she] is not responsible for any harm that [*name of plaintiff*] may have suffered because [he/she] was [*name of defendant*]'s co-employee and therefore can recover only under California's Workers' Compensation Act. To succeed, [*name of defendant*] must prove all of the following:

1. That [*name of plaintiff*] and [*name of defendant*] were [*name of employer*]'s employees;
 2. That [*name of employer*] [had workers' compensation insurance [covering [*name of plaintiff*] at the time of injury]/was self-insured for workers' compensation claims [at the time of [*name of plaintiff*]'s injury]]; and
 3. That [*name of defendant*] was acting in the scope of [his/her] employment at the time [*name of plaintiff*] claims [he/she] was harmed.
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Directions for Use

This instruction is intended for use in cases where a co-employee is the defendant and he or she claims that the case falls within the workers' compensation exclusivity rule. For instructions on scope of employment see instructions in the Vicarious Liability series (Instructions 3700–3726). Scope of employment in this instruction is the same as in the context of respondeat superior. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 740 [1 Cal.Rptr.2d 543, 819 P.2d 1].) See instructions in the Vicarious Responsibility series regarding the definition of “scope of employment.”

Sources and Authority

- Labor Code section 3601 provides:
 - (a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is, except as specifically provided in this section, the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment, except that an employee, or his or her dependents in the event of his or her death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against the other employee, as if this division did not apply, in either of the following cases:
 - (1) When the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.
 - (2) When the injury or death is proximately caused by the intoxication of the other employee.

- (b) In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a).
 - (c) No employee shall be held liable, directly or indirectly, to his or her employer, for injury or death of a coemployee except where the injured employee or his or her dependents obtain a recovery under subdivision (a).
- Labor Code section 3351 provides, in part: “ ‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.”
 - Labor Code section 3357 provides: “Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.”
 - “[A] coemployee’s conduct is within the scope of his or her employment if it could be imputed to the employer under the doctrine of respondeat superior. If the coemployee was not ‘engaged in any active service for the employer,’ the coemployee was not acting within the scope of employment.” (*Hendy, supra*, 54 Cal.3d at p. 740, internal citation omitted.)
 - “[G]enerally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers’ Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application.” (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96 [151 Cal.Rptr. 347, 587 P.2d 1160].)
 - “In general, if an employer condones what courts have described as ‘horseplay’ among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply.” (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1006 [111 Cal.Rptr.2d 564, 30 P.3d 57], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (9th ed. 1987) Workers’ Compensation, §§ 60–64, pp. 620–623

1 California Employment Law, Ch. 20, Liability for Work-Related Injuries, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, Effect of Workers’ Compensation Law, § 10.13 (Matthew Bender)

1 Herlick, California Workers' Compensation Law (6th Edition), Ch. 12, Tort Actions-Subrogation, § 12.22 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, Workers' Compensation, § 577.316 (Matthew Bender)

10 California Points and Authorities, Ch. 100, Employer and Employee (Matthew Bender)

DAMAGES

3901. Introduction to Tort Damages—Liability Established (*Revised 2004*)

[Name of defendant]'s responsibility for *[name of plaintiff]*'s claimed harm is not an issue for you to decide in this case. You must decide whether *[name of plaintiff]* was harmed and, if so, how much money will reasonably compensate *[name of plaintiff]* for the harm. This compensation is called "damages."

The amount of damages must include an award for each item of harm that was caused by *[name of defendant]*'s wrongful conduct, even if the particular harm could not have been anticipated.

[Name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, you must not speculate or guess in awarding damages.

[The following are the specific items of damages claimed by *[name of plaintiff]*:]

[Insert applicable instructions on items of damage.]

Directions for Use

Read last bracketed sentence and insert instructions on items of damage here only if Instruction 3902, *Economic and Noneconomic Damages*, is not being read. If Instruction 3902 is not used, this instruction should be followed by applicable instructions (see Instructions 3903A through 3903N, and 3905A) concerning the items of damage claimed by the plaintiff. These instructions should be inserted into this instruction as sequentially numbered items.

Sources and Authority

- Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."
- Civil Code section 3281 provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation in money, which is called damages."
- Civil Code section 3283 provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

- Civil Code section 3359 provides: “Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”
- Under Civil Code section 3333 “[t]ort damages are awarded to compensate a plaintiff for all of the damages suffered as a legal result of the defendant’s wrongful conduct.” (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466], italics omitted.)
- “Whatever its measure in a given case, it is fundamental that ‘damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery.’ However, recovery is allowed if claimed benefits are reasonably certain to have been realized but for the wrongful act of the opposing party.” (*Piscitelli v. Friedenber* (2001) 87 Cal.App.4th 953, 989 [105 Cal.Rptr.2d 88], internal citations omitted.)
- “In general, one who has been tortiously injured is entitled to be compensated for the harm and the injured party must establish ‘by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit.’ However, ‘[t]here is no general requirement that the injured person should prove with like definiteness the extent of the harm that he has suffered as a result of the tortfeasor’s conduct. It is desirable that responsibility for harm should not be imposed until it has been proved with reasonable certainty that the harm resulted from the wrongful conduct of the person charged. It is desirable, also, that there be definiteness of proof of the amount of damage as far as is reasonably possible. It is even more desirable, however, that an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.’ ” (*Clemente v. State of California* (1985) 40 Cal.3d 202, 219 [219 Cal.Rptr. 445, 707 P.2d 818], internal citations omitted.)
- “If plaintiff’s inability to prove his damages with certainty is due to defendant’s actions, the law does not generally require such proof.” (*Clemente, supra*, 40 Cal.3d at p. 219, internal citations omitted.)
- “While a defendant is liable for all the damage that his tortuous act proximately causes to the plaintiff, regardless of whether or not it could have been anticipated, nevertheless a proximate causal connection must still exist between the damage sustained by the plaintiff and the defendant’s wrongful act or omission, and the detriment inflicted on the plaintiff must still be the natural and probable result of the defendant’s conduct.” (*Chaparkas v. Webb* (1960) 178 Cal.App.2d 257, 260 [2 Cal.Rptr. 879], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1319–1326

4 Levy et al., California Torts, Ch. 50, Damages, § 50.02 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Bodily Injury, §§ 1.2–1.6

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

1 Bancroft-Whitney's California Civil Practice (1992) Torts, § 5:1

DAMAGES

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated (Revised 2004)

If you decide that *[name of defendant]*'s conduct caused *[name of plaintiff]* harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages only if *[name of plaintiff]* proves by clear and convincing evidence that *[name of defendant]* engaged in that conduct with malice, oppression, or fraud.

“Malice” means that *[name of defendant]* acted with intent to cause injury or that *[name of defendant]*'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

“Oppression” means that *[name of defendant]*'s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in knowing disregard of *[his/her]* rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that *[name of defendant]* intentionally misrepresented or concealed a material fact and did so intending to harm *[name of plaintiff]*.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

- (a) How reprehensible was *[name of defendant]*'s conduct?
 - (b) ~~What is~~ Is there a reasonable relationship between the amount of punitive damages ~~in light of~~ and *[name of plaintiff]*'s harm?
 - (c) In view of *[name of defendant]*'s financial condition, what amount is necessary to punish *[him/her]* and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because *[name of defendant]* has substantial financial resources. [Any award you impose may not exceed *[name of defendant]*'s ability to pay.]
-

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use Instruction 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use Instruction 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence” see Instruction 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language in subdivision (c) only if the defendant has presented relevant evidence regarding this issue.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Ins. Co., supra*, 538 U.S. at p. 418. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court’s reasoning. (See, e.g., *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71].); *Henley v. Philip Morris Inc.*, (2003) 112 Cal.App.4th 198, review granted, ~~depublished by~~ *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [~~*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars.~~]

The California Supreme Court recently granted review in three appellate decisions that involve post-Campbell punitive damages awards. (*Henley v. Philip Morris, Inc.* (2004) 114 Cal.App.4th 1429 [9 Cal.Rptr.3d 29], review granted Apr. 28, 2004, S123023; *Simon v. San Paolo U.S. Holding Company* (2003) 113 Cal.App.4th 1137 [7 Cal.Rptr.3d 367], review granted Mar. 24, 2004, S121933; *Johnson v. Ford Motor Company*, review granted Mar. 24, 2004, S121723.) At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings. Because state and federal law in this area is evolving, the court should assess whether changes to the instruction are appropriate based on any recent decisions.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish

and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant’s conduct, even if that harm did not come to pass: “The high court in *TXO [TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW [BMW of North America, Inc. v. Gore]* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

Sources and Authority

- Civil Code section 3294 provides, in part:
 - (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
 - (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
 - (c) As used in this section, the following definitions shall apply:

- (1) “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
 - (2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.
 - (3) “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
 - “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)
 - “Punitive damages are to be assessed in an amount which, depending upon the defendant’s financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff ‘whole,’ punitive damages are a ‘windfall’ form of recovery.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
 - “It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
 - “ ‘A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)
 - “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that

the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- “[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.” (*Neal, supra*, 21 Cal.3d at p. 928, internal citations and footnote omitted.)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 123 S.Ct. at p. 1521, internal citation omitted.)
- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427 [internal citation omitted].)

- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (Adams, supra, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (Adams, supra, 54 Cal.3d at p. 112, internal citations omitted.)
- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)
- “Malice, for purposes of awarding exemplary damages, includes ‘despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.’ To establish conscious disregard, the plaintiff must show ‘that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.’ ” (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)
- “Used in its ordinary sense, the adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, ‘malice’ requires more than a ‘willful and conscious’ disregard of the plaintiffs’ interests. The additional component of ‘despicable conduct’ must be found.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 725, internal citations omitted.)
- “We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [“reasonable relation”] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon, supra*, 211 Cal.App.3d at p. 1605.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, 1335–1341, 1369–1381

4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.15–14.18

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3942. Punitive Damages—Individual Defendant Bifurcated Trial (Second Phase) (*Revised 2004*)

You must now decide the amount, if any, that you should award [name of plaintiff] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

- (a) How reprehensible was [name of defendant]’s conduct?
 - (b) ~~What is~~ **Is there a reasonable relationship between the amount of punitive damages in light of and [name of plaintiff]’s harm?**
 - (c) **In view of [name of defendant]’s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]’s ability to pay.]**
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Directions for Use

Read the bracketed language in subdivision (c) only if the defendant has presented relevant evidence regarding this issue.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 418. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court’s reasoning. (See, e.g., *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71].) ~~;*Henley v. Philip Morris Inc.*, (2003) 112 Cal.App.4th 198, review granted, republished by *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004~~

~~Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars.}]~~

The California Supreme Court recently granted review in three appellate decisions that involve post-Campbell punitive damages awards. (*Henley v. Philip Morris, Inc.* (2004) 114 Cal.App.4th 1429 [9 Cal.Rptr.3d 29], review granted Apr. 28, 2004, S123023; *Simon v. San Paolo U.S. Holding Company* (2003) 113 Cal.App.4th 1137 [7 Cal.Rptr.3d 367], review granted Mar. 24, 2004, S121933; *Johnson v. Ford Motor Company*, review granted Mar. 24, 2004, S121723.) At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings. Because state and federal law in this area is evolving, the court should assess whether changes to the instruction are appropriate based on any recent decisions.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant’s conduct, even if that harm did not come to pass: “The high court in *TXO [TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366] and *BMW [BMW of North America, Inc. v. Gore]* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

Sources and Authority

- Civil Code section 3294 provides, in part: “In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing

evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.”

- Civil Code section 3295(d) provides: “The court shall, on application of any defendant, preclude the admission of evidence of that defendant’s profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.”
- “[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants’ financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of ‘oppression, fraud or malice,’ in accordance with Civil Code section 3294.” (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- “Evidence of the defendant’s financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295.” (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)
- “[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused.” (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)
- “Punitive damages are to be assessed in an amount which, depending upon the defendant’s financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff ‘whole,’ punitive damages are a ‘windfall’ form of recovery.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- “It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- “ ‘A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)
- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant’s financial condition, such evidence is ‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- “[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant’s acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant’s wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.” (*Neal, supra*, 21 Cal.3d at p 928, internal citations and footnote omitted.)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.”

(*State Farm Mutual Automobile Insurance Co.*, *supra*, 123 S.Ct. at p. 1521, internal citation omitted.)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427 [internal citation omitted].)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams*, *supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams*, *supra*, 54 Cal.3d at p. 112, internal citations omitted.)
- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605.)
- “We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [“reasonable relation”] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1327, pp. 784–786, 1369–1381, pp. 836–852

4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.20–54.25, 54.24[4][d] (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.1–14.8, 14.23

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated (*Revised 2004*)

If you decide *[name of employee/agent]*'s conduct caused *[name of plaintiff]* harm, you must decide whether that conduct justifies an award of punitive damages against *[name of defendant]* for *[name of employee/agent]*'s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against *[name of defendant]* for *[name of employee/agent]*'s conduct only if *[name of plaintiff]* proves by clear and convincing evidence that *[name of employee/agent]* engaged in that conduct with malice, oppression, or fraud.

“Malice” means that *[name of employee/agent]* acted with intent to cause injury, or that *[name of employee/agent]*'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

“Oppression” means that *[name of employee/agent]*'s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in knowing disregard of *[his/her]* rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that *[name of employee/agent]* intentionally misrepresented or concealed a material fact and did so intending to harm *[name of plaintiff]*.

[Name of plaintiff] must also prove [one of] the following by clear and convincing evidence:

1. [That *[name of employee/agent]* was an officer, director, or managing agent of *[name of defendant]* who was acting on behalf of *[name of defendant]* [or]]
2. [That an officer, a director, or a managing agent of *[name of defendant]* had advance knowledge of the unfitness of *[name of employee/agent]* and employed *[him/her]* with a knowing disregard of the rights or safety of others; [or]]
3. [That an officer, a director, or a managing agent of *[name of defendant]* authorized *[name of employee/agent]*'s conduct; [or]]

4. [That an officer, a director, or a managing agent of [name of defendant] knew of [name of employee/agent]’s wrongful conduct and adopted or approved the conduct after it occurred.]

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

- (a) How reprehensible was [name of defendant]’s conduct?
 - (b) ~~What is~~ Is there a reasonable relationship between the amount of punitive damages ~~in light of~~ and [name of plaintiff]’s harm?
 - (c) In view of [name of defendant]’s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]’s ability to pay.]
-

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence” see Instruction 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language in subdivision (c) only if the defendant has presented relevant evidence regarding this issue.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” *State*

Farm Mutual Automobile Insurance Co. v. Campbell (2003) 538 U.S. 408 [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 418. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court’s reasoning. (See, e.g., *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71].) ; *Henley v. Philip Morris Inc.*, (2003) 112 Cal.App.4th 198, review granted, ~~depublished by *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars].)~~

The California Supreme Court recently granted review in three appellate decisions that involve post-Campbell punitive damages awards. (*Henley v. Philip Morris, Inc.* (2004) 114 Cal.App.4th 1429 [9 Cal.Rptr.3d 29], review granted Apr. 28, 2004, S123023; *Simon v. San Paolo U.S. Holding Company* (2003) 113 Cal.App.4th 1137 [7 Cal.Rptr.3d 367], review granted Mar. 24, 2004, S121933; *Johnson v. Ford Motor Company*, review granted Mar. 24, 2004, S121723.) At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings. Because state and federal law in this area is evolving, the court should assess whether changes to the instruction are appropriate based on any recent decisions.

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated* for additional sources and authority.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO [TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW [BMW of North America, Inc. v. Gore]* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

Sources and Authority

- Civil Code section 3294 provides, in part:
 - (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
 - (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
 - (c) As used in this section, the following definitions shall apply:
 - (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
 - (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
 - (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.
- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting

subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- “ ‘California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.’ The ‘additional’ burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b).” (*Weeks, supra*, 63 Cal.App.4th at p. 1154, internal citation omitted.)
- “Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee’s wrongful conduct. It authorizes an award of punitive damages against an employer for the employer’s own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee.” (*Weeks, supra*, 63 Cal.App.4th at pp. 1154–1155.)
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.”

(*State Farm Mutual Automobile Insurance Co.*, *supra*, 123 S.Ct. at p. 1521, internal citation omitted.)

- “[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- “Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice.” (*Weeks, supra*, 63 Cal.App.4th at p. 1137.)
- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723.)
- The concept of “managing agent” “assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723.)
- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at pp. 723-724.)
- “ ‘The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their “level” in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.’ ” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White, supra*, 21 Cal.4th at pp. 566–567.)

- “In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business.” (*White, supra*, 21 Cal.4th at p. 577.)
- “ ‘[C]orporate policy’ is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A ‘managing agent’ is one with substantial authority over decisions that set these general principles and rules.” (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- “ ‘[R]atification’ is the ‘[c]onfirmation and acceptance of a previous act.’ A corporation cannot confirm and accept that which it does not actually know about.” (*Cruz, supra*, 83 Cal.App.4th at p. 168.)
- “For purposes of determining an employer’s liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726.)
- “Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, § 54.07 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3945. Punitive Damages—Entity Defendant Trial Not Bifurcated (Revised 2004)

If you decide that *[name of defendant]*'s conduct caused *[name of plaintiff]* harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against *[name of defendant]* only if *[name of plaintiff]* proves that *[name of defendant]* engaged in that conduct with malice, oppression, or fraud. To do this, *[name of plaintiff]* must prove [one of] the following by clear and convincing evidence:

1. [That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of *[name of defendant]* who acted on behalf of *[name of defendant]*; [or]]
2. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of *[name of defendant]*; [or]]
3. [That one or more officers, directors, or managing agents of *[name of defendant]* knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

“Malice” means that *[name of defendant]* acted with intent to cause injury or that *[name of defendant]*'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

“Oppression” means that *[name of defendant]*'s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in knowing disregard of [his/her] rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that *[name of defendant]* intentionally misrepresented or concealed a material fact and did so intending to harm *[name of plaintiff]*.

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

- (a) How reprehensible was [name of defendant]’s conduct?**
 - (b) ~~What is~~ Is there a reasonable relationship between the amount of punitive damages ~~in light of~~ and [name of plaintiff]’s harm?**
 - (c) In view of [name of defendant]’s financial condition, what amount is necessary to punish it and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]’s ability to pay.]**
-

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, and managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use Instruction 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use Instruction 3947, *Punitive Damages—Individual and Entity Defendants—Trial not Bifurcated*.

For an instruction explaining “clear and convincing evidence” see Instruction 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language in subdivision (c) only if the defendant has presented relevant evidence regarding this issue.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 418. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court's reasoning. (See, e.g., *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71].) ; *Henley v. Philip Morris Inc.* (2003) 112 Cal.App.4th 198, review granted, depublished by *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars].)

The California Supreme Court recently granted review in three appellate decisions that involve post-Campbell punitive damages awards. (*Henley v. Philip Morris, Inc.* (2004) 114 Cal.App.4th 1429 [9 Cal.Rptr.3d 29], review granted Apr. 28, 2004, S123023; *Simon v. San Paolo U.S. Holding Company* (2003) 113 Cal.App.4th 1137 [7 Cal.Rptr.3d 367], review granted Mar. 24, 2004, S121933; *Johnson v. Ford Motor Company*, review granted Mar. 24, 2004, S121723.) At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings. Because state and federal law in this area is evolving, the court should assess whether changes to the instruction are appropriate based on any recent decisions.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: “The high court in *TXO [TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366] and *BMW [BMW of North America, Inc. v. Gore]* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the

potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

Sources and Authority

- Civil Code section 3294 provides, in part:
 - (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
 - (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
 - (c) As used in this section, the following definitions shall apply:
 - (1) “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
 - (2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.
 - (3) “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.
- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful,

fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 123 S.Ct. at p. 1521, internal citation omitted.)
- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- “[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723.)
- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee's duties therein.” (*College Hospital, Inc.*, *supra*, 8 Cal.4th at pp. 723–724.)
- “ ‘The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their “level” in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.’ ” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee’s discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis.” (*White*, *supra*, 21 Cal.4th at pp. 566–567.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, § 54.07 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3947. Punitive Damages—Individual and Entity Defendants Trial Not Bifurcated (Revised 2004)

If you decide that *[name of individual defendant]*'s or *[name of entity defendant]*'s conduct caused *[name of plaintiff]* harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages against *[name of individual defendant]* only if *[name of plaintiff]* proves by clear and convincing evidence that *[name of individual defendant]* engaged in that conduct with malice, oppression, or fraud.

You may award punitive damages against *[name of entity defendant]* only if *[name of plaintiff]* proves that *[name of entity defendant]* acted with malice, oppression, or fraud. To do this, *[name of plaintiff]* must prove [one of] the following by clear and convincing evidence:

1. [That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of *[name of entity defendant]* who acted on behalf of *[name of entity defendant]*; [or]]
2. [That an officer, a director, or a managing agent of *[name of entity defendant]* had advance knowledge of the unfitness of *[name of individual defendant]* and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]
3. [That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of *[name of entity defendant]*; [or]]
4. [That one or more officers, directors, or managing agents of *[name of entity defendant]* knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

“Malice” means that a defendant acted with intent to cause injury or that a defendant’s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

“Oppression” means that a defendant's conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in knowing disregard of [his/her] rights.

“Despicable conduct” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

“Fraud” means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [name of plaintiff].

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

There is no fixed standard for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following separately for each defendant in determining the amount:

- (a) How reprehensible was that defendant’s conduct?**
 - (b) ~~What is~~ Is there a reasonable relationship between the amount of punitive damages ~~in light of~~ and [name of plaintiff]’s harm?**
 - (c) In view of that defendant’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant’s ability to pay.]**
-

Directions for Use

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use Instruction 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or Instruction 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence” see Instruction 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language in subdivision (c) only if the defendant has presented relevant evidence regarding this issue.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See Instruction 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 418. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court’s reasoning. (See, e.g., *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71]; *Henley v. Philip Morris Inc.* (2003) 112 Cal.App.4th 198, review granted, ~~republished with minor change~~ [*Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188, republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars].)

The California Supreme Court recently granted review in three appellate decisions that involve post-Campbell punitive damages awards. (*Henley v. Philip Morris, Inc.* (2004) 114 Cal.App.4th 1429 [9 Cal.Rptr.3d 29], review granted Apr. 28, 2004, S123023; *Simon v. San Paolo U.S. Holding Company* (2003) 113 Cal.App.4th 1137 [7 Cal.Rptr.3d 367], review granted Mar. 24, 2004, S121933; *Johnson v. Ford Motor Company*, review granted Mar. 24, 2004, S121723.) At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings. Because state and federal law in this area is evolving, the court should assess whether changes to the instruction are appropriate based on any recent decisions.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you

determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant's conduct, even if that harm did not come to pass: "The high court in *TXO [TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW [BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

Sources and Authority

- Civil Code section 3294 provides, in part:
 - (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
 - (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.
 - (c) As used in this section, the following definitions shall apply:
 - (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
 - (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
 - (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.
- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- “Subdivision (b) is not a model of clarity, but in light of California’s history of employer liability for punitive damages and of the Legislature’s reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)
- “ ‘California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.’ The ‘additional’ burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b).” (*Weeks, supra*, 63 Cal.App.4th at p. 1154, internal citation omitted.)
- “Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee’s wrongful conduct. It authorizes an award of punitive damages against an employer for the employer’s own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee.” (*Weeks, supra*, 63 Cal.App.4th at pp. 1154–1155.)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 123 S.Ct. at p. 1521, internal citation omitted.)

- “An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant’s conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is ‘but one verdict based upon contract’ a punitive damage award is improper.” (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242].)
- “[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- “Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice.” (*Weeks, supra*, 63 Cal.App.4th at p. 1137.)
- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)
- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)
- “[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 723.)
- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc., supra*, 8 Cal.4th at pp. 723–724.)
- “ ‘The determination whether employees act in a managerial capacity [i.e., are managing agents] does not necessarily hinge on their “level” in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.’ ” (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 421 [27 Cal.Rptr.2d 457], internal citation omitted.)
- “[W]e conclude the Legislature intended the term ‘managing agent’ to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately

determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566–567.)

- “In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business.” (*White, supra*, 21 Cal.4th at p. 577.)
- “ ‘[C]orporate policy’ is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A ‘managing agent’ is one with substantial authority over decisions that set these general principles and rules.” (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)
- “ ‘[R]atification’ is the ‘[c]onfirmation and acceptance of a previous act.’ A corporation cannot confirm and accept that which it does not actually know about.” (*Cruz, supra*, 83 Cal.App.4th at p. 168.)
- “For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726.)
- “Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature.” (*College Hospital, Inc., supra*, 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, § 54.07 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

DAMAGES

3949. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual) Bifurcated Trial (Second Phase) (Revised 2004)

You must now decide the amount, if any, that you should award [*name of plaintiff*] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following separately for each defendant in determining the amount:

- (a) How reprehensible was that defendant's conduct?
 - (b) ~~What is~~ **Is there a reasonable relationship between the** amount of punitive damages ~~in light of~~ and [*name of plaintiff*]'s harm?
 - (c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? **You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]**
-

Directions for Use

Read the bracketed language in subdivision (c) only if the defendant has presented relevant evidence regarding this issue.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408 [123 S.Ct. 1513, 1522–1523, 155 L.Ed.2d 585]. An instruction on this point should be included within this instruction if appropriate to the facts.

In June 2003, the United States Supreme Court restated the due process principles limiting awards of punitive damages in *State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 418. Several subsequent California Court of Appeal cases have responded to various aspects of the United States Supreme Court's reasoning. (See, e.g., *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 [in light of *Campbell*, it is error to give BAJI 14.71].) ; *Henley v. Philip Morris Inc.*, (2003) 112 Cal.App.4th 198, review granted, ~~depublished by~~ *Henley v. Philip Morris Inc.* (2003) 2003 Cal.LEXIS 10188,

republished with minor change [*Henley v. Philip Morris Inc.* (2004) 2004 Cal.App.LEXIS 57] [*Campbell* leads court of appeal to reduce punitive damages from 25 million to 9 million dollars].)

The California Supreme Court recently granted review in three appellate decisions that involve post-Campbell punitive damages awards. (*Henley v. Philip Morris, Inc.* (2004) 114 Cal.App.4th 1429 [9 Cal.Rptr.3d 29], review granted Apr. 28, 2004, S123023; *Simon v. San Paolo U.S. Holding Company* (2003) 113 Cal.App.4th 1137 [7 Cal.Rptr.3d 367], review granted Mar. 24, 2004, S121933; *Johnson v. Ford Motor Company*, review granted Mar. 24, 2004, S121723.) At this time, because of the recent and rapidly developing state of California law, the Advisory Committee has elected not to make substantive modifications to the CACI instructions on punitive damages in response to these holdings. Because state and federal law in this area is evolving, the court should assess whether changes to the instruction are appropriate based on any recent decisions.

Courts have stated that “[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight.” (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Regarding the relationship between punitive and compensatory damages, case law suggests that a jury may consider harm that could have been caused by the defendant’s conduct, even if that harm did not come to pass: “The high court in *TXO [TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 [113 S.Ct. 2711, 125 L.Ed.2d 366]] and *BMW [BMW of North America, Inc. v. Gore]* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the potential loss to the plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], internal citations omitted.)

Sources and Authority

- Civil Code section 3294 provides, in part: “In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.”
- Civil Code section 3295(d) provides: “The court shall, on application of any defendant, preclude the admission of evidence of that defendant’s profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.”
- “[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants’ financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of ‘oppression, fraud or malice,’ in accordance with Civil Code section 3294.” (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- “Evidence of the defendant’s financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295.” (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)
- “[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused.” (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- “The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.” (*Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)
- “Punitive damages are to be assessed in an amount which, depending upon the defendant’s financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff ‘whole,’ punitive damages are a ‘windfall’ form of recovery.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- “It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- “ ‘A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713].)
- “In light of our holding that evidence of a defendant’s financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant’s financial condition, such evidence is ‘essential to the claim for relief.’ ” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)
- “[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant’s acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant’s wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.” (*Neal, supra*, 21 Cal.3d at p. 928, internal citations and footnote omitted.)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct

involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 123 S.Ct. at p. 1521, internal citation omitted.)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427 [internal citation omitted].)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams*, *supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams*, *supra*, 54 Cal.3d at p. 112, internal citations omitted.)
- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)
- “In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury.” (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605.)
- “We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)
- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [“reasonable relation”] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon*, *supra*, 211 Cal.App.3d at p. 1605.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

4 Levy et al., California Torts, Ch. 54, Punitive Damages, §§ 54.07, 54.24[4][d]
(Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23

15 California Forms of Pleading and Practice, Ch. 177, Damages (Matthew Bender)

6 California Points and Authorities, Ch. 65, Damages (Matthew Bender)

CONCLUDING INSTRUCTIONS

5000. Duties of the Judge and Jury (*Revised 2004*)

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You must follow these instructions as well as those that I previously gave you. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial. Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. [Do not read, listen to, or watch any news accounts of this trial.] You must not let bias, sympathy, prejudice, or public opinion influence your decision.

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are. In addition, the order of the instructions does not make any difference.

[Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words

the same, no matter what their format. Simply accept the instruction in its final form.]

Directions for Use

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments. The Advisory Committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Code of Civil Procedure section 608 provides that “[i]n charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict.” It also provides that the court “must inform the jury that they are the exclusive judges of all questions of fact.” (See also Code Civ. Proc., § 592.)
- Evidence Code section 312(a) provides that “[e]xcept as otherwise provided by law, where the trial is by jury [a]ll questions of fact are to be decided by the jury.”
- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478–479 [6 Cal.Rptr. 289, 353 P.2d 929].)
- Jurors must avoid bias: “ ‘The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.’ [Citations.]” (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)
- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484 [121 Cal.Rptr. 891].)
- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629–630.)
- In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57–59 [118 Cal.Rptr. 184, 529 P.2d 608], the Supreme Court held that the giving of cautionary instructions stating that no undue emphasis was intended by repetition and that the judge did not

intend to imply how any issue should be decided, out to be considered in weighing the net effect of the instructions on the jury.

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 268

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.20.

28 California Forms of Pleading and Practice, Ch. 326, Jury Instructions, § 326.21
(Matthew Bender)

CONCLUDING INSTRUCTIONS

5009. Predeliberation Instructions (*Revised 2004*)

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations. Also, do not immediately announce how you plan to vote. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case. Such training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you or ask to see the any exhibits admitted into evidence that have not already been provided to you. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the clerk or bailiff. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

[At least nine jurors must agree on each verdict and on each question that you are asked to answer. However, the same jurors do not have to agree on each verdict or each question. Any nine jurors are sufficient. As soon as you have agreed on a verdict and answered all the questions as instructed, the presiding juror must date and sign the form(s) and notify the clerk or the bailiff.]

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then make the average your verdict.

You may take breaks, but do not ~~resume your discussions~~ discuss this case with anyone, including each other, until all of you are back in the jury room.

Directions for Use

The Advisory Committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

The sixth paragraph is bracketed because this point appears in the special verdict form instructions. Read if the special verdict instruction (Instruction 5012, *Introduction to Special-Verdict Form*) is not also being read.

Judges may want to provide each juror with a copy of the verdict forms so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judge may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

Delete reference to reading back testimony in cases where the proceedings are not being recorded.

Sources and Authority

Code of Civil Procedure section 613 provides, in part: “When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court.”

Code of Civil Procedure section 614 provides: “After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.”

Code of Civil Procedure section 618 and article I, section 16, of the California Constitution provide that three-fourths of the jurors must agree to a verdict in a civil case.

The prohibition on chance or quotient verdict is stated in Code of Civil Procedure section 657, which provides that a verdict may be vacated and a new trial ordered “whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance.” (See also *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064–1065 [18 Cal.Rptr.2d 106].)

Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)

The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 330, 336

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.01 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, Jury Instructions, § 326.32, Ch. 326A, Jury Verdicts, § 326A.14 (Matthew Bender)